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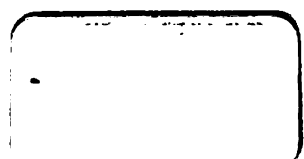
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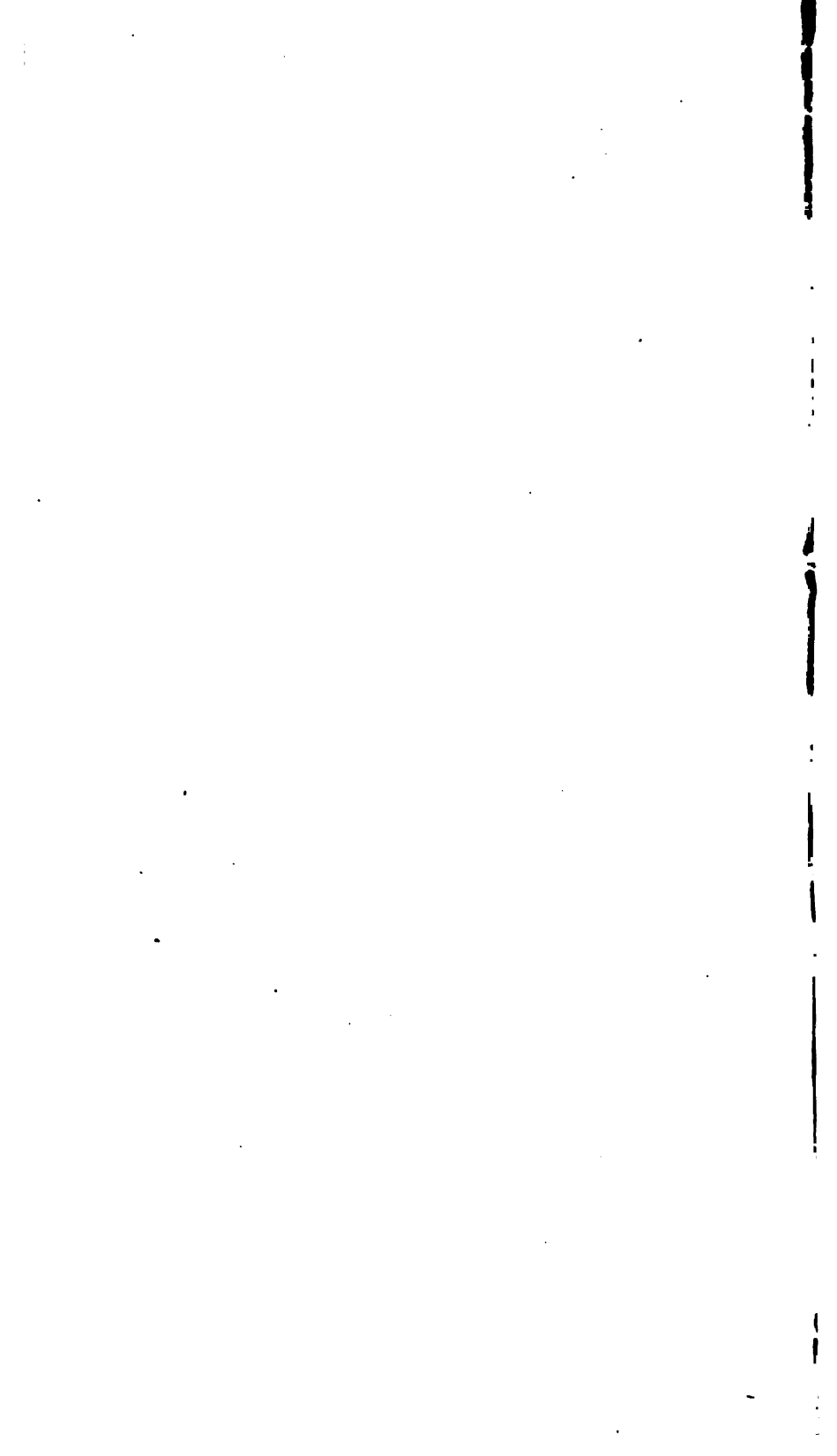
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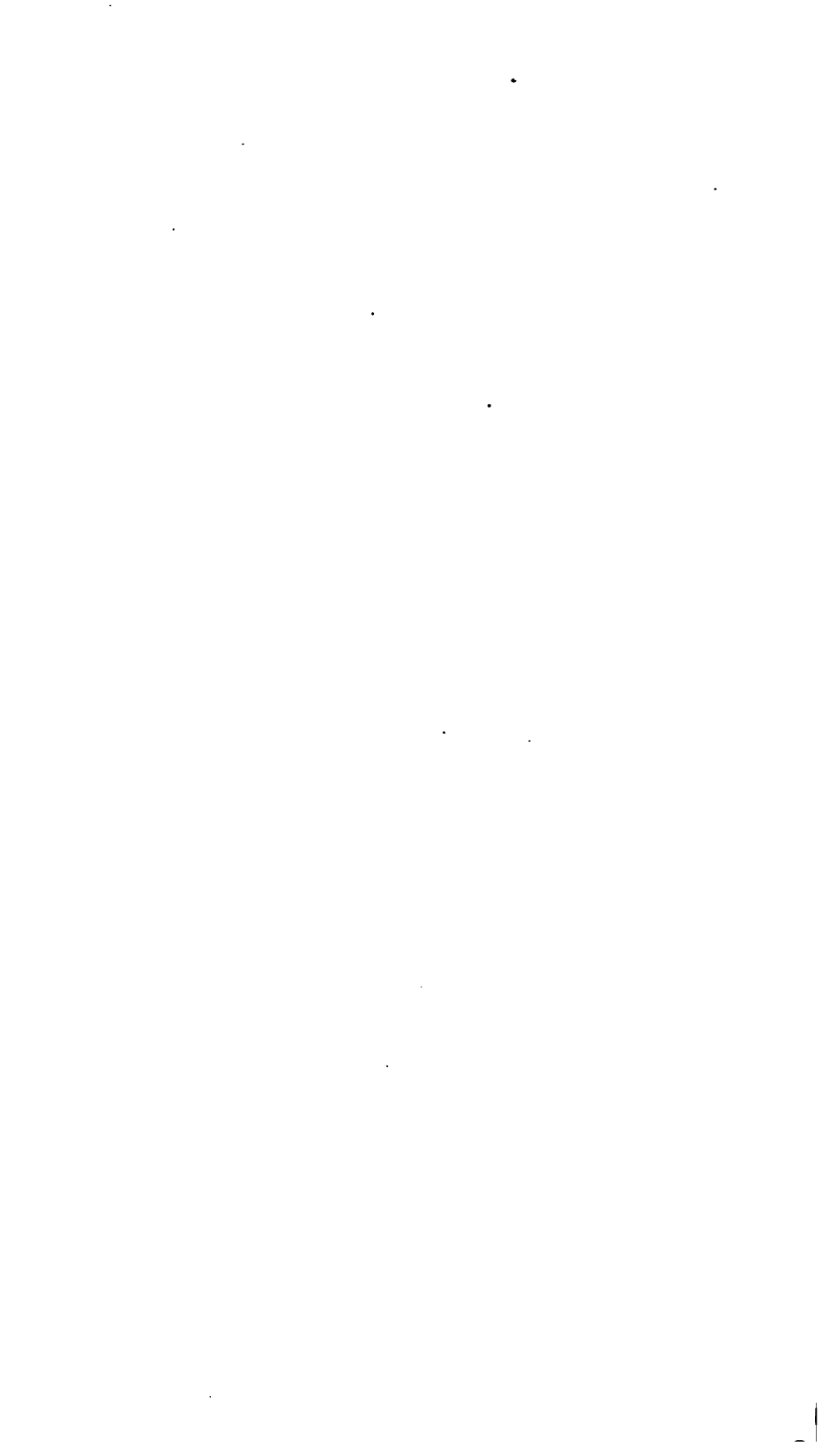
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISES ON THE LAW OF JUDGMENTS,"
"COVENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

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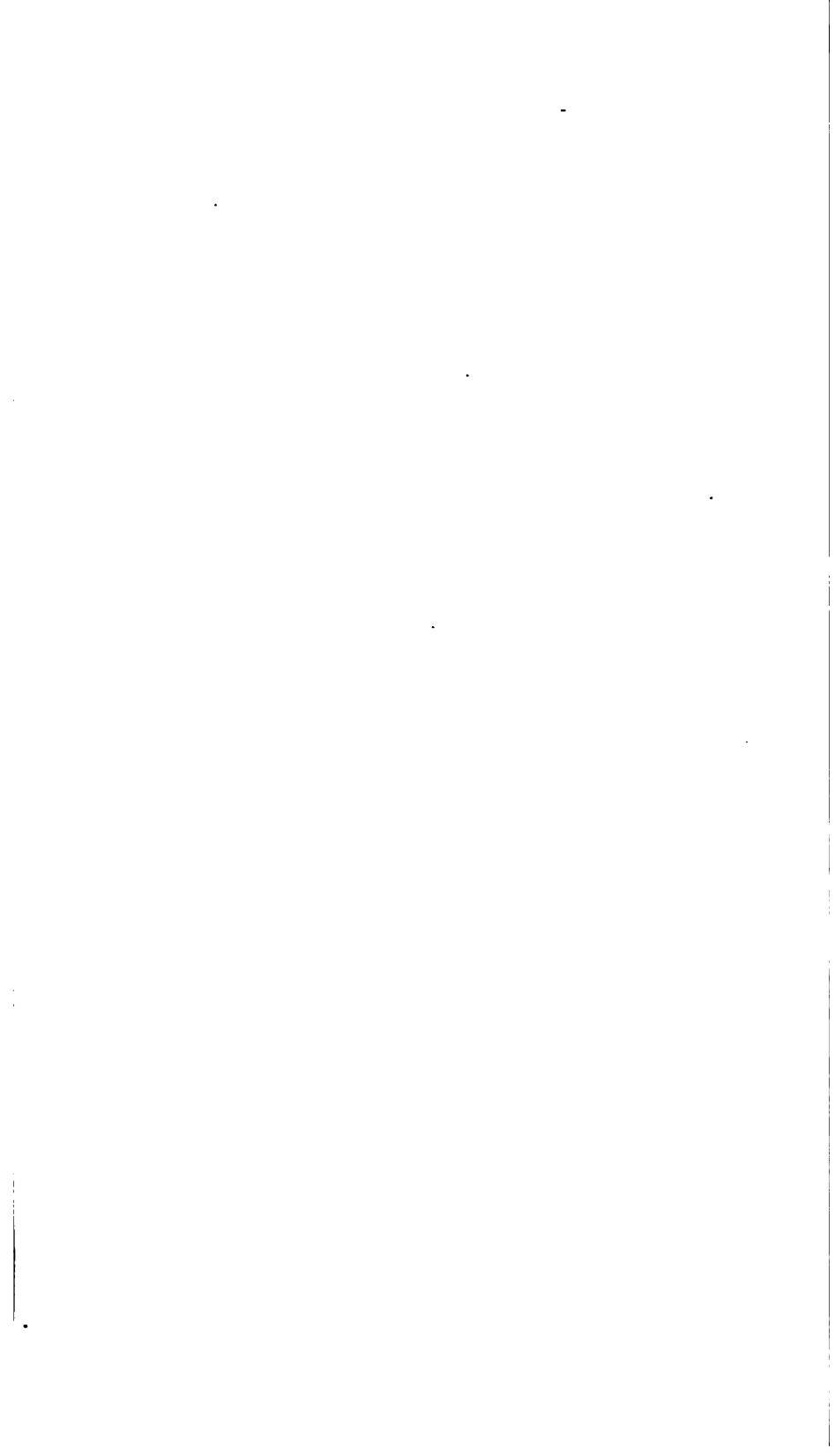
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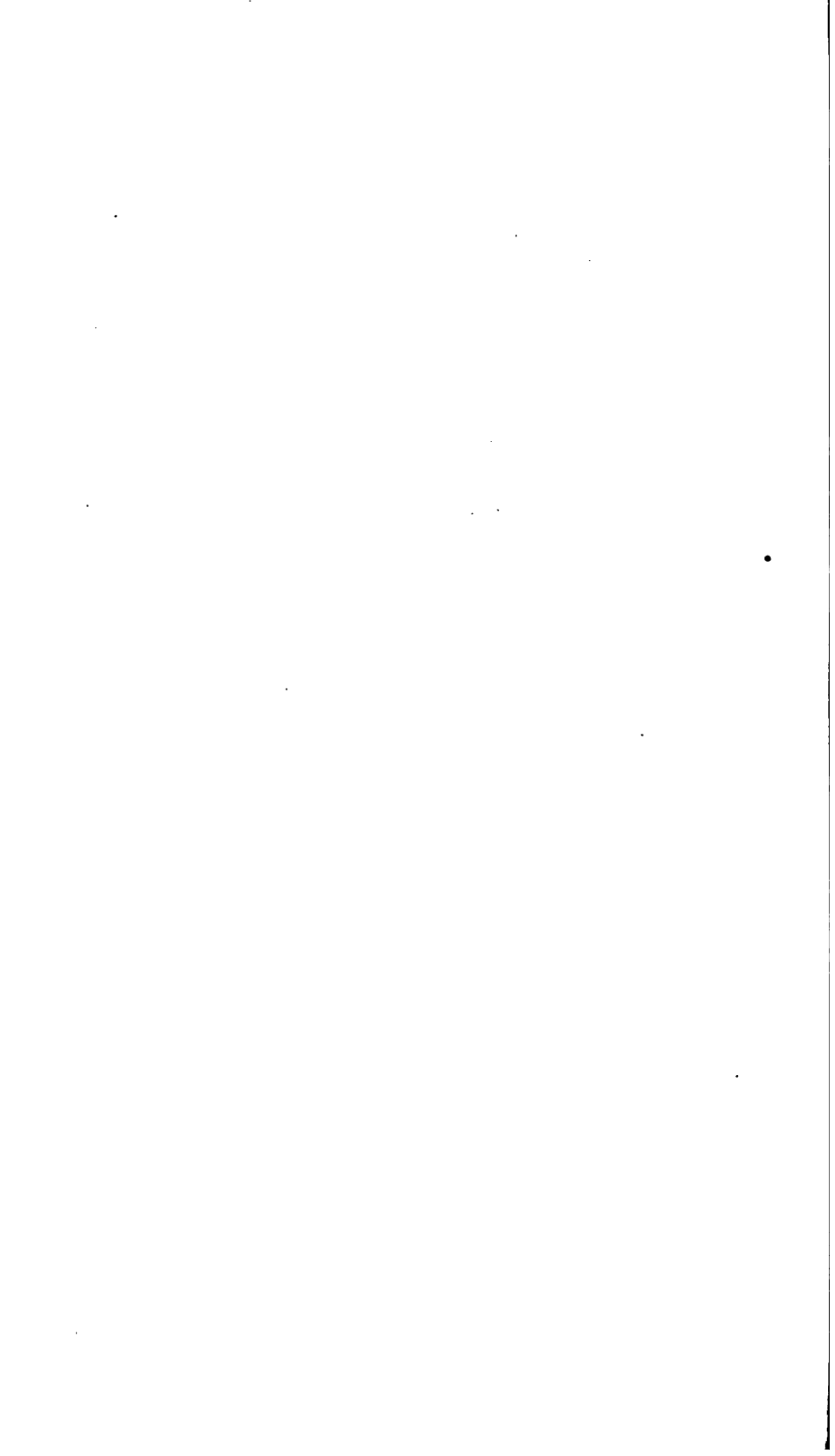
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PEOPLE v. VERNON.

[35 CALIFORNIA, 49.]

DECLARATIONS SPRINGING OUT OF PRINCIPAL TRANSACTION ARE TO BE REGARDED as contemporaneous with it, and are admissible in evidence as part of the *res gestæ*, if they tend to explain the principal transaction, and were voluntarily made at a time so near to although not precisely concurrent with it as to preclude the idea of deliberate design.

DECLARATIONS BY DECEASED WHILE REALIZING HIMSELF TO BE IN DYING CONDITION, concerning the circumstances attending the receipt of his fatal wounds, though made early in the morning, and his death did not occur until the middle of the afternoon of the same day, are admissible in evidence against the defendant, on trial charged with the murder of the deceased.

FACT THAT WRITTEN STATEMENT OF DECLARATIONS MADE BY DECEASED IN EXTREMIS, verified by him, was read in evidence on the trial of the party thereby accused of murder, is no objection to the introduction of other and independent evidence of the same or similar declarations.

THE opinion states the case.

Thomas A. Brown, for the appellant.

Jo Hamilton, attorney-general, for the people.

By Court, SPRAGUE, J. The defendant was indicted for murder, and convicted upon the indictment of the crime of manslaughter. On appeal to this court, the case is presented upon alleged errors of the court below in admitting, in behalf of the prosecution, against the objections of defendant, evidence of the declarations of the deceased. It appears from the evidence, as presented in the record, that a witness, Dainty, resided about two hundred feet from the residence of the

prisoner; that deceased called at witness's house on Friday evening, the 21st of December, between ten and eleven o'clock, and requested him to go with deceased to the house of prisoner for the purpose of amicably arranging a recent difficulty between prisoner and deceased. Dainty told deceased to wait till he put on his clothes, and he would go along; to which deceased replied that he would go along and see prisoner, if he was up; and if he was in bed, he would call him up, and witness could come along. Witness dressed himself, and started; had passed about half the length of his porch when he heard a shot; continued to advance towards prisoner's house, and immediately heard three more shots in quick succession, and when he got about half-way to prisoner's house, met deceased walking fast from the direction of prisoner's house; that it was about half a minute, and not exceeding three quarters of a minute, from the time witness heard the first shot till he met deceased, who immediately said he had been shot treacherously by defendant; that he, deceased, was sitting down on defendant's porch; that defendant came out to the door, and spoke to him, and said: "Wait till I go and put my boots on"; and instead of going to put his boots on, he came out with a gun, and shot him when he was sitting on the porch; that when he, deceased, got up to go away, defendant followed after and shot him in the back.

The objection to these declarations of deceased being given in evidence is urged upon the ground that they were not made at the very time of the shooting, but after the shooting had been concluded.

That these declarations, made under such circumstances, and in such connection with the main fact as to allow them to be given in evidence as a part of the *res gestæ*, we have no doubt, and no error was committed in admitting them as such.

Declarations, to be a part of the *res gestæ*, are not required to be precisely concurrent in point of time with the principal fact, if they spring out of the principal transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design, then they are to be regarded as contemporaneous, and are admissible: 1 Greenl. Ev., sec. 108; *Mitchum v. State*, 11 Ga. 615; *Commonwealth v. McPike*, 3 Cush. 181 [50 Am. Dec. 727].

The other objection urged to the evidence of the declarations made by deceased *in extremis* are clearly untenable.

From the evidence it appears that deceased, after receiving the fatal wounds on Friday evening, lived till three o'clock P. M. of the following Sunday; that Saturday about noon he was informed by his attending physician that he could live but a short time, and expressed his belief that he could not live long. On Sunday morning, early, he said to his wife, and witnesses Martin, McNulty, and Ruggles, that he could live but a short time, and after so expressing himself to Martin, he made a statement to him voluntarily, as he said, his dying declarations of the circumstances attending the receipt of his fatal wounds. These statements Martin immediately communicated to witness McNulty, who reduced them to writing, and read the statement carefully to deceased, who said it was correct, signed the same, and verified it, after which he made a statement to Ruggles, his physician, and immediately before to his wife. All these statements, including the one made to witness Dainty, were substantially the same, not varying in any material fact.

There is no reason to doubt from the evidence but that when these declarations were made on Sunday morning and forenoon, that the deceased fully realized that he was in a dying condition.

The fact that a written memorandum of the statement verified by deceased was read in evidence is no objection to the introduction of independent oral evidence of the same or similar dying declarations of deceased: 1 Greenl. Ev., secs. 160, 161; *Montgomery v. State*, 11 Ohio, 424; *Rex v. Bonner*, 6 Car. & P. 386; *King v. Woodcock*, 1 Leach, 500; *Ward v. State*, 8 Blackf. 101; *People v. Glen*, 10 Cal. 32; *People v. Lee*, 17 Id. 76.

Judgment affirmed.

RES GESTÆ. — One of the most important functions of the law of evidence is to prevent the confusion of the court and jury, and the burdening of the record with a mass of hearsay and irrelevant testimony, which can only tend to obscure the real issues and to give rise to others of only apparent and not real importance, besides giving to the trial of a cause a cumbrous movement and an uncertain direction highly detrimental to the ends of justice. But there is a class of evidence which forms an exception to the general rules of hearsay and relevancy, termed the *res gestæ*, which is admitted, although it is in fact hearsay or apparently irrelevant, because without it a clear understanding of the nature of the litigated act cannot be had, and to obtain this should of course be the prime object of the rules of evidence, — by admitting as well as by excluding evidence.

DEFINITION. — It is well and truly said by Mr. Greenleaf in his work on evidence that "the affairs of men consist of a complication of circumstances

so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each during its existence has its inseparable attributes, and its kindred facts materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury, along with the principal fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description": 1 Greenl. Ev., sec. 108. Mr. Wharton defines *res gestæ* as "those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or by-stander; they may comprise things left undone as well as things done. Their sole distinguishing feature is, that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act, — a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act." In fine, a fact or declaration to constitute part of the *res gestæ* must be contemporaneous with the principal transaction, or nearly so, must be so intimately interwoven with it as to be a part of the transaction itself, and must be free from any implication of premeditation or purpose to manufacture testimony: See *Rawson v. Haigh*, 2 Bing. 104; *Ridley v. Gyde*, 9 Id. 349, 352; *Bateman v. Bailey*, 5 Term Rep. 512; *Smith v. Kramer*, 1 Bing. N. C. 585; *Lord v. Colvin*, 4 Drew. 366; *Henry v. Warehouse Co.*, 2 Notes of Cas. 389; *Tomkies v. Reynolds*, 17 Ala. 109; *Powell v. Olds*, 9 Id. 861; *Sansford v. Howard*, 29 Id. 684; *Autauga v. Davis*, 32 Id. 703; *Bragg v. Massie*, 38 Id. 89; *Mobile R. R. v. Ashcraft*, 48 Id. 15; *Cornelius v. State*, 12 Ark. 782; *People v. Vernon*, 35 Cal. 49; *Sill v. Reese*, 47 Id. 294; *Russell v. Frisbie*, 19 Conn. 205; *Mitchum v. State*, 11 Ga. 615; *Batton v. Watson*, 13 Id. 63; S. C., 58 Am. Dec. 504; *Printup v. Mitchell*, 17 Ga. 558; *Clayton v. Tucker*, 20 Id. 452; *Southwest R. R. v. Rowan*, 43 Id. 411; *Stiles v. State*, 57 Id. 183; *Flanders v. Maynard*, 58 Id. 56; *Amick v. Young*, 69 Ill. 542; *Paul v. Berry*, 78 Id. 158; *Beardstown v. Virginia*, 81 Id. 841; *Caldwell v. Evans*, 85 Id. 88; *Thorp v. Goewey*, 85 Id. 611; *Sander v. People*, 104 Ill. 248; *Boone Bank v. Wallace*, 18 Ind. 82; *Hamilton v. State*, 38 Ind. 281; *Frink v. Coe*, 49 G. Greene, 555; S. C., 61 Am. Dec. 141; *Simmons v. Rust*, 39 Iowa, 241; *State v. Domingues*, 32 La. Ann. 428; *Corinth v. Lincoln*, 34 Me. 310; *Cornville v. Brighton*, 39 Id. 333; *Handy v. Johnson*, 5 Md. 450; *Curtis v. Moore*, 20 Id. 93; *Pool v. Bridges*, 4 Pick. 379; *Allen v. Duncan*, 11 Id. 309; *Haynes v. Rutter*, 24 Id. 242; *Lund v. Tyngsborough*, 9 Cush. 36; *Boston R. R. v. Dana*, 1 Gray, 83; *Nutting v. Page*, 4 Id. 584; *Blake v. Damon*, 103 Mass. 199; *Parker v. Steamboat Co.*, 109 Id. 449; *Commonwealth v. Vosburg*, 112 Id. 419; *Stowall v. Farmers' and Merchants' Bank*, 8 Smedes & M. 305; S. C., 47 Am. Dec. 85; *Mann v. Best*, 62 Mo. 591; *Rollins v. Strout*, 6 Nev. 150; *Newman v. Bean*, 21 N. H. 93; *Plumer v. French*, 22 Id. 450; *Altherto v. Tilton*, 44 Id. 452; *Gray v. Goodrich*, 7 Johns. 95; *Haight v. Haight*,

19 N. Y. 464; *Volts v. Blackmar*, 64 Id. 440; *Toomley v. Railroad Co.*, 69 Id. 158; *State v. Rawles*, 65 N. C. 334; *State v. Garrand*, 5 Or. 216; *Jones v. Brownfield*, 2 Pa. St. 55; *Rees v. Livingston*, 41 Id. 113; *Bank of Woodstock v. Clark*, 25 Vt. 308; *Fifield v. Richardson*, 34 Id. 310; *Sorenson v. Dundas*, 42 Wis. 642; *Bass v. Railroad Co.*, 42 Id. 654; *Fell v. Amidon*, 43 Id. 467; *Prideaux v. Mineral Point*, 43 Id. 513; *Mack v. State*, 48 Id. 271; *United States v. O'Meara*, 1 Cranch C. C. 165; *Jewell v. Jewell*, 1 How. 219; *Flint v. Trans. Co.*, 7 Blatchf. 536; *In re Clark*, 9 Id. 379.

CIRCUMSTANCES AND DECLARATIONS CHARACTERIZING TRANSACTION IN QUESTION, and intimately connected with it so as to form a part of it, are admissible therefor as part of the *res gestæ*, if they conform to the other requisites of spontaneity and contemporaneity.

Conversations and Declarations.—Thus, conversations closely connected with the facts in issue, and explaining and characterizing them, are admissible as parts of the *res gestæ*: *Stewart v. Brown*, 48 Mich. 383; *Mack v. State*, 48 Wis. 271; *Bragg v. Massie*, 38 Ala. 89; S. C., 79 Am. Dec. 82. In an action arising out of an altercation on shipboard, testimony as to what was said by the ship's officers during the altercation was admitted: *Brockett v. New Jersey Steamboat Co.*, 18 Fed. Rep. 156. And the celebrated case of *Res v. Gordon*, 21 How. St. Tr. 542, is familiar, where upon the trial of Lord George Gordon for treason the cry of the mob, "No popery," as they accompanied the accused on his enterprise, was admitted as part of the *res gestæ*, and as explanatory of the principal fact. So in an action for false imprisonment, where the defense was that the plaintiff had been given into custody for forging a bill of exchange, which had been dishonored on presentment to the drawer, a witness who had accompanied the defendant to the drawer was allowed to testify as to what the drawer said when he refused to accept the bill: *Perkins v. Vaughan*, 4 Man. & G. 988.

Public Surveyor.—Declarations of a public surveyor while making a survey, respecting what he was doing, for whom, and why, are admissible as part of the *res gestæ*, in a suit for the establishment of a boundary line: *George v. Thomas*, 16 Tex. 74; S. C., 67 Am. Dec. 612; and see *Hunnicut v. Peyton*, 102 U. S. 333, 364; *Hill v. Proctor*, 10 W. Va. 59.

Entry upon Land.—And so where a person makes an entry upon land for the purpose of taking advantage of a forfeiture, to foreclose a mortgage or to defeat a disseisin, his declarations, made at the time of his entry and explanatory of its character and purpose, are admissible like other material facts: Co. Lit. 49 b, 245 b; 3 Bla. Com. 174, 175; *Robison v. Sweet*, 3 Greenl. 316.

Business Transactions and Official Acts.—Declarations of the parties made with regard to matters of business, if contemporaneous with the acts they tend to explain and qualify, are admissible as parts of the *res gestæ*: *Purkiss v. Benson*, 28 Mich. 538; *Kimball v. Vroman*, 35 Id. 310; *Bank v. Kennedy*, 17 Wall. 19. Thus the declarations of a party made upon receiving money, that more is still due him, are admissible: *Dillard v. Scruggs*, 36 Ala. 670; and see *Webster v. Canmann*, 40 Mo. 156; and likewise, the declarations of a person made upon the payment of money, to show the application of the payment or that he pays as the agent of another: *Bank of Woodstock v. Clark*, 25 Vt. 308; *Carter v. Beale*, 44 N. H. 408. So in an action against an executor for work done under contract with his testator, the fact that the executor oversaw the work was held to be admissible as part of the *res gestæ*: *McKeown v. Harvey*, 40 Mich. 226. But upon the question of whether a contract was or was not evidence that one party thereto did not then have the property which

he agreed to deliver, or that his partner told him not to make the contract, is not of the *res gesta*, and therefore is not admissible: *Nash v. Hoxie*, 59 Wis. 384. Declarations of a deceased grantor, made as part of the *res gesta* at the time of the execution of a deed, are admissible upon the question of its consideration: *Kenney v. Phillippy*, 91 Ind. 511; and see *Ghormley v. Young*, 71 Id. 621. And so declarations made by the owner of a farm as to the terms on which the occupant was cultivating it, made in the presence of the latter, and assented to by him, or in connection with some act of the owner in carrying on the farm, are admissible as showing a mutual recognition of the terms on which the farm was being cultivated, or as part of the *res gesta*, in an action by the occupant for his share of the products: *White v. Morton*, 22 Vt. 15; S. C., 52 Am. Dec. 75. And the declarations of a married woman in objecting to the acknowledgment of a deed which she acknowledges under protest are admissible on the same principle: *Louden v. Blythe*, 16 Pa. St. 532.

The declarations of officers at the time of making a levy are admissible: *Dobbs v. Justice*, 17 Ga. 624; *Morgan v. Sims*, 26 Id. 283; *Arnold v. Gove*, 1 Rawle, 233; *Grandy v. McPherson*, 7 Jones, 347; and so in general are the declarations of any public officer if made in the discharge of an official duty and forming a part thereof, provided, of course, the act itself be admissible: *George v. Thomas*, 16 Tex. 74; S. C., 67 Am. Dec. 612.

The declarations of a party in accepting service of process are admissible: *Feagan v. Cuneton*, 19 Ga. 404. And so, where a person was sought for at his own house for the purpose of making a tender to him, the declarations of his wife, made at the time, in refusing to give information where he could be found, and to the effect that he would not accept the tender, were received in evidence: *Steele v. Thompson*, 3 Penr. & W. 34.

Questions of Fraud. — Upon a question of fraud, declarations made at the time of the transaction become a part of the *res gesta*. Thus, declarations of the plaintiff made at the time of entering into a contract may be given in evidence in an action to enforce it, where the defense is that it was procured by false and fraudulent representations: *Crump v. United States M. Co.*, 7 Gratt. 352; S. C., 56 Am. Dec. 116; and see also *Ghormley v. Young*, 71 Ind. 621; *Cameron v. Lewis*, 59 Miss. 134. So in an action for the conversion of personal property the defense was, that the plaintiff's claim was based on a judgment confessed by J. for the purpose of fraud. On the trial, evidence was admitted of J.'s declarations before the sale, while on his way to see one with whom he had made arrangements that he should buy the property. And it was held that the declarations were admissible, being a part of the fraudulent transaction: *Davis v. Drew*, 58 Cal. 152. So the declarations of a grantor are admissible as part of the *res gesta* against the grantee, if they tend to show fraud in the making of the deed; and though made to a conveyancer who prepared the deed, and not in the grantee's presence, they may be received in a case where the grantor's creditors seek to vacate the deed as fraudulent against them: *McDowell v. Goldsmith*, 6 Md. 319; S. C., 61 Am. Dec. 305; *Pearson v. Forsyth*, 61 Ga. 537. And in an action of trover by a vendor for goods sold, on the ground that the sale was void, the goods having been purchased by the vendee with a preconceived design not to pay for them, evidence of false representations made by the buyer to the clerk of the vendor as to his credit is admissible as part of the *res gesta*, though not communicated to the seller until after the sale, where similar representations were immediately afterwards made by the buyer to the vendor himself, to induce the sale: *Thompson v. Rose*, 16 Conn. 71; S. C., 41 Am. Dec. 121.

And so on the trial of an action brought by a principal against an agent who had charge of certain business of the principal for many years, to recover money received by the defendant from clandestine sales of property of the plaintiff, and money of the plaintiff fraudulently taken by the defendant, evidence that the defendant at the time of entering the plaintiff's service was insolvent, and that he had since received only a limited salary and some small additional compensation, and that subsequent to the time of his alleged misdoings, and during the period specified in the writ, he was the owner of a large property, far exceeding the aggregate of all his salary and receipts while in the plaintiff's service, is admissible as having some tendency to prove, if the jury are satisfied by other evidence that money had been taken from the plaintiff by some one in his employ, that the defendant is the guilty person; such facts being in the nature of *res gestæ* accompanying the very acts and transactions of the defendant under investigation, and tending to give them character and significance. And the declarations of the defendant concerning his property and business transactions, made to third persons, in the absence of the plaintiff or his agents, are inadmissible to rebut such evidence: *Boston etc. R. R. Corp. v. Dana*, 1 Gray, 83, 101-103; and see *Commonwealth v. Montgomery*, 11 Met. 534. The declarations of by-standers at a sheriff's sale are also admissible as part of the *res gestæ* in a question of fraud, when they show that the purchaser's professions affected the bidding: *Walter v. Gernant*, 13 Pa. St. 515; S. C., 53 Am. Dec. 491. And in an action upon a note given upon the purchase of a quantity of guano, statements concerning the value of guano, made by a third party, in the presence of the maker and payee, while a trade which resulted in its sale was pending, are admissible in evidence as part of the *res gestæ*: *Griffin v. Cleghorn*, 63 Ga. 384.

Letters written by the parties to the action, and relating to the *res gestæ*, are admissible in evidence: *Tapley v. Tapley*, 10 Minn. 448; S. C., 88 Am. Dec. 76; see *Beck v. Ulrich*, 13 Pa. St. 636; S. C., 53 Am. Dec. 507. Thus in an action against a railroad company to recover for rails and material furnished, defendant's secretary, for the defense, testified, upon cross-examination, that, so far as he knew, defendant procured no materials from any source. This was new matter, unconnected with that introduced upon the direct examination. The witness was then shown letters written by him, as secretary, to the seller of the material, some time before it was delivered, and others written while the delivery was going on. The letters showed knowledge, and urged a prompt delivery; and it was held that they were admissible, treating the witness, as to the new matter, as plaintiff's witness, to refresh his recollection, and as part of the *res gestæ*: *Scott v. Middletown, Unionville, etc. R. R. Co.*, 86 N. Y. 200. And so, on the issue of whether a receipt was obtained by fraud and extortion, letters between the parties, showing what passed between them when the receipt was given, are admissible as part of the *res gestæ*: *McAllister v. Engle*, 52 Mich. 56. And it has also been held that it is competent for the plaintiff, for the purpose of proving upon whose credit goods sued for were sold, to put in evidence a letter written by himself, at the time the bargain was made, to his agent, desiring him to inquire as to the credit of the defendant, of a person to whom the person receiving the goods had referred him for that purpose, and stating therein that the defendant was the buyer. And the jury were allowed to look at the whole letter; and although it was not in itself evidence of the truth of the fact affirmed, it was said that it might be considered as corroborative of the plaintiff's version of the transaction: *Milne v. Leisler*, 7 Hurl. & N. 786; see also *Eastman v. Bennett*, 6 Wis. 232; but see *Corder v. Talbot*, 14 W. Va. 277. Where the testimony shows

that the defendant sent a message to the plaintiff concerning the matter in dispute, the answer to such message is a part of the *res gestæ*, — an inseparable and necessary incident to the message: *McGoon v. Irwin*, 1 Pinn. 526; S. C., 44 Am. Dec. 409. But where the defendant offered in evidence letters written to the plaintiff by a third person, and there was no evidence that the writer was plaintiff's agent, or that the letters related to matters within the scope of his agency, or constituted part of *res gestæ*, they were inadmissible: *Hamilton v. Berry*, 74 Mo. 176.

Dying Declarations are admitted, as such, only in the case of a trial for the homicide of the declarant, upon the ground that they were made in *extremis*; but "where they constitute part of the *res gestæ*, or come within the exception of declarations against interest, or the like, they are admissible as in other cases, irrespective of the fact that the declarant was under apprehension of death": 1 Greenl. Ev., sec. 156; *Wright v. Littler*, 3 Burr. 1244; *Aveson v. Kimaird*, 6 East, 188; *Stobart v. Dryden*, 1 Mees. & W. 615, 627; *Regina v. Megson*, 9 Car. & P. 418, 420; *Regina v. Hewett*, 1 Car. & M. 534; *Insurance Co. v. Mosley*, 8 Wall. 397; *State v. Peace*, 1 Jones, 251; *Oliver v. State*, 17 Ala. 587; *Brownell v. Pacific R. R. Co.*, 47 Mo. 239. And even upon a trial for homicide, the dying declarations are restricted to the act of killing, and the circumstances immediately attending the act and forming a part of the *res gestæ*: *State v. Shelton*, 2 Jones, 360; S. C., 64 Am. Dec. 587. And so the dying declarations of the victim of an abortion are admissible on a prosecution for death thereby, but only to show *res gestæ*, not what happened before or after the act was committed; and they must be statements of facts, not of opinion: *Montgomery v. State*, 80 Ind. 338; S. C., 41 Am. Rep. 815. And dying declarations, not part of the *res gestæ*, are not competent in exculpation of the accused: *Moock v. People*, 100 Ill. 242; S. C., 39 Am. Rep. 38.

Acts and Declarations of Conspirators. — Where several are associated together for the same illegal purpose, any act or declaration of one of them, in reference to the common object, and forming part of the *res gestæ*, may be given in evidence against the others: *State v. Soper*, 16 Me. 293; S. C., 33 Am. Dec. 665; *Commonwealth v. Ratcliffe*, 130 Mass. 36; see *Crownshield's Case*, 10 Pick. 497; *Jacobs v. Shorey*, 48 N. H. 100; *State v. Larkin*, 49 Id. 39; *Ellis v. Dempsey*, 4 W. Va. 126; *United States v. Hartwell*, 3 Cliff. 221; *United States v. McKee*, 3 Dill. 546; *American Fur Co. v. United States*, 2 Pet. 358, 365; *Rex v. Hardy*, 24 How. St. Tr. 451-453, 475; *Rex v. Hunt*, 3 Barn. & Ald. 566; S. C., 1 East P. C. 97, sec. 38; *Nicholls v. Dowding*, 1 Stark. 81; *Rex v. Watson*, 32 How. St. Tr. 7; *Rex v. Brandreth*, 32 Id. 857, 858; *Daniels v. Potter*, 1 Moody & M. 501; *Wright v. Court*, 2 Car. & P. 232; *State v. Jackson*, 29 La. Ann. 354; *Reid v. Louisiana State Lottery*, 29 Id. 388; *State v. Duncan*, 64 Mo. 262; *Phillips v. State*, 6 Tex. App. 364; *Kelley v. People*, 55 N. Y. 565; *People v. Stanley*, 47 Cal. 113; after the proper foundation is laid, by proving the fact of the conspiracy, or by the introduction of evidence proper to be submitted to the jury as tending to prove it: 1 Greenl. Ev., sec. 111; *Ormsby v. People*, 53 N. Y. 472; *Wilson v. O'Day*, 5 Daly, 354; *Smith v. Tarboz*, 70 Me. 127; *Street v. State*, 43 Miss. 1; *Garrard v. State*, 50 Id. 147; *Taylor v. State*, 3 Tex. App. 169; *Reid v. Louisiana State Lottery*, 29 La. Ann. 388. Thus where there is a mutual agreement to arm and fight, and the parties separate and arm with pistols, and meet again within an hour, and fight with the pistols, all pertinent acts and declarations of either party in the interval belong to the *res gestæ*: *Cox v. State*, 64 Ga. 374; S. C., 37 Am. Rep. 76. And so the acts and declarations of persons engaged in a riot are admissible against them as part of *res gestæ*, though tending to prove

malicious destruction of property: *Gallaher v. State*, 101 Ind. 411. And so also the declaration of parties while engaged in a combination to procure a fraudulent sale of a debtor's goods are admissible as part of the *res gestæ* to prove such combination in an action by a defrauded creditor who had a bill of sale of the goods against a purchaser at such sale: *Crary v. Sprague*, 12 Wend. 41; S. C., 27 Am. Dec. 110; *Stovall v. Farmers' and Merchants' Bank*, 8 Smedes & M. 305; S. C., 47 Am. Dec. 85.

Facts as Well as Declarations may form parts of the *res gestæ*, and be admissible for that reason, though the most frequent instances of the application of the principle consist of declarations, for such evidence, if admissible at all, must be admitted by exception to the general rule of hearsay; and therefore the question of the admissibility of declarations as part of the *res gestæ* is of common occurrence. Facts, however, are not unfrequently admitted on this ground against the objection of irrelevancy. Thus the presence or absence of a flag-man at a crossing at the time the plaintiff's intestate was run over there, is a part of the *res gestæ*, and admissible for the plaintiff; and so is the fact that the railroad company generally kept a flag-man at that place: *Casey v. New York Central etc. R. R. Co.*, 6 Abb. N. C. 104. So inscriptions upon flags and banners, or the contents of a proclamation or placard, may sometimes be proved without producing the originals: *Ree v. Hunt*, 3 Barn. & Ald. 574; *Bruce v. Nicolupolo*, 11 Ex. 129; 1 Wharton on Evidence, sec. 264. So, also, where a defendant was indicted for making a certain alteration of a brand on six cattle, it was held that evidence that the alteration of the brand on some of the cattle was different from that alleged was admissible, being of the *res gestæ*, such alteration having been made at the same time and as part of the same transaction: *House v. State*, 15 Tex. App. 252. And where during an affray the prisoner, who was indicted for assaulting A, also assaulted B, it was held that the assault upon B was of the *res gestæ*, and that a conviction under the indictment would not be set aside because the witnesses in describing the affray spoke of the assault of B: *Piela v. People*, 6 Col. 343. So under an indictment for having counterfeiting tools in possession, or for passing counterfeit money, it is competent for the prosecution to show, in proving guilty knowledge and intent, that the defendant several days afterwards had counterfeit money in his possession, or had previously uttered other counterfeit money: *Commonwealth v. Price*, 10 Gray, 472; S. C., 71 Am. Dec. 668; *McCartney v. State*, 3 Ind. 356; S. C., 56 Am. Dec. 510, and note 512; *People v. White*, 34 Cal. 183; *People v. Farrell*, 30 Id. 316. But under an indictment for murder, evidence that a few minutes before the killing the prisoner had a quarrel with another person in another bar-room, where deceased was not present, and with which he was in no wise connected, was not admissible as part of the *res gestæ*: *Joyce v. Commonwealth*, 78 Va. 287. And the declaration of one who, while defendant was shooting in a crowd appeared frightened, and said defendant was shooting at him, is not admissible on the trial of defendant for assault with intent to kill: *Flynn v. State*, 43 Ark. 289.

ACTS AND DECLARATIONS MUST BE CONTEMPORANEOUS WITH PRINCIPAL TRANSACTION in order to form part of the *res gestæ*, or so near in point of time that they must be regarded as parts of the principal transaction, and so immediately and closely connected therewith in this respect as to be practically inseparable, and indispensable to a clear understanding of the matter in question. This connection in point of time, together with the logical connection above alluded to, which renders the evidence explanatory and illustrative of the principal fact, constitute the main criterions for determining

the admissibility of evidence on this ground: *Sharp v. Newsholme*, 5 Bing. N. C. 517; *Doorman v. Jenkins*, 2 Ad. & E. 256; *Ridley v. Gyde*, 9 Bing. 349; *Vacher v. Cocks*, 5 Moody & M. 353; *Bateman v. Bailey*, 5 Term Rep. 512; *Doe v. Arkwright*, 5 Car. & P. 575; *Bank v. Kennedy*, 17 Wall. 19; *Insurance Co. v. Mosley*, 8 Id. 397; *Boyden v. Burke*, 14 How. 575; *Brazier v. Burt*, 18 Ala. 201; *Jennings v. Blocker*, 25 Id. 415; *Sayre v. Durwood*, 35 Id. 247; *Patterson v. Flanagan*, 37 Id. 513; *Weaver v. Lapsley*, 42 Id. 601; *Tewis v. Hicks*, 41 Cal. 123; *Whitney v. Durkin*, 48 Id. 462; *Enos v. Tuttle*, 3 Conn. 250; *Rockwell v. Taylor*, 41 Id. 56; *Taylor v. Lusk*, 9 Iowa, 444; *Blake v. Graves*, 18 Id. 312; *Smith v. Cooke*, 31 Md. 174; *Allen v. Duncan*, 11 Pick. 308; *Commonwealth v. McPike*, 3 Cush. 181; *Blood v. Rideout*, 13 Met. 237; *Commonwealth v. Hackett*, 2 Allen, 136; *Scaggs v. State*, 8 Smedes & M. 722; *Criddle v. Criddle*, 21 Mo. 522; *Harriman v. Stowe*, 57 Id. 93; *Sessions v. Little*, 9 N. H. 271; *Peppinger v. Low*, 6 N. J. L. 384; *Kelly v. Campbell*, 2 Abb. App. 492; *Reed v. Railroad Co.*, 56 Barb. 493; *In re Taylor*, 9 Paigo, 611; *People v. Davis*, 56 N. Y. 102; *Devling v. Little*, 26 Pa. St. 502; *Custar v. Gas Co.*, 63 Id. 381; *Rogers v. Broadnax*, 27 Tex. 238; *Brazelton v. Turney*, 7 Cold. 267; *Eastman v. Bennett*, 6 Wis. 232. The declarations "must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction": *Per Hosmer, C. J.*, in *Enos v. Tuttle*, 3 Conn. 250. Thus the statements of a defendant to the plaintiff's attorney of his reasons for executing a note, made at the time of its execution, are admissible as part of the *res gestæ*. But his statements of them at a subsequent time, in the absence of plaintiff, are not admissible for him: *Martin v. Tucker*, 35 Ark. 279. Nor where a party, upon removing an ancient fence, put down a stone in one of the post-holes, and the next day declared that he put it there as a boundary, could this declaration be admitted in his favor, as it did not constitute any part of the act done: *Noyes v. Ward*, 19 Conn. 250; see also *Corinth v. Lincoln*, 34 Me. 310.

Meaning of Contemporaneous. — No rule can be formulated by which to determine how near in point of time to the main fact the declaration must be to make it admissible. No two cases are exactly alike, and the determination of this question is always inseparable from the circumstances of the cause at bar; and the matter is usually one for the trained judgment and sound discretion of the court, enlightened by legal principles and the general rules of evidence. Exact coincidence of time cannot, however, be required. A declaration is seldom, if ever, absolutely simultaneous with the act it illustrates. And the transaction itself may extend throughout days, weeks, and even months; and what is said and done in connection with it, constituting the *res gestæ*, may extend over a like period. As in cases of bankruptcy and the like, "if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestæ*": *Per Lord Denman*, in *Rouch v. Railroad Co.*, 1 Q. B. 51. See also *Rawson v. Haigh*, 5 Bing. 104; *S. C.*, 9 Moore, 217; *Ridley v. Gyde*, 9 Bing. 349. "The area of events covered by the term '*res gestæ*' depends upon the circumstances of each particular case. When a business man coolly and disengagedly completes half a dozen distinct negotiations in the course of an hour, the sweep taken by the *res gestæ* in each case is limited to what is done in the time of the particular negotiation: *Miles v. Knott*, 12 Gill & J. 442. When, however, one man of high parts and great energy is employed in a single protracted negotiation of great importance, then we can conceive of

his whole time for weeks being absorbed in the negotiation, and of its so tingling with its characteristics everything that he does and says that for all this period the things which he does and says become rather the incidents of the negotiation than of himself: *Fifield v. Richardson*, 34 Vt. 410; *Cunningham v. Parks*, 97 Mass. 172; *Muscoigne v. Radd*, 54 Ga. 33. So if in one of our streets there is an unexpected collision between two men entire strangers to each other, then the *res gestæ* of the collision are confined within the few moments that it occupies. When, again, there is a social feud, in which two religious factions, as in the case of the Lord George Gordon disturbances, or of the Philadelphia riots of 1844, are arrayed against each other for weeks, and so much absorbed in the collision as to be conscious of little else, then all that such parties do and say under such circumstances is as much part of the *res gestæ* as the blows given in the homicides, for which particular prosecutions may be brought": 1 Wharton on Evidence, sec. 258; *Commonwealth v. Sherry and Commonwealth v. Daley*, reported in appendix to Wharton on Homicide; *Rex v. Gordon*, 21 How. St. Tr. 542. And so in an action for the improper driving of a horse on July 4th, causing its death July 8th, the horse having been left by the owner with a livery-stable keeper to let to proper parties, statements made by the general manager of the stable on July 7th, as to the condition of the horse when returned to the stable July 4th, were admissible as part of the *res gestæ*: *Homan v. Boyce*, 15 Neb. 545.

The current of authority in the United States does not adhere strictly to the idea of coincidence of time in the admission of declarations; but though they are made a few minutes or a very short time after the occurrence of the principal fact which they serve to explain or illustrate, they are still regarded as admissible if the connection with the main fact is plainly and clearly established, and if they are free from the suspicion of being concocted or manufactured, and are evidently spontaneous: *Insurance Co. v. Mosley*, 8 Wall. 397; *Newton v. Mutual Ben. Life Ins. Co.*, 21 Dill. C. C. 154; *Beaver v. Taylor*, 1 Wall. 637; *Jewell v. Jewell*, 1 How. 219; *People v. Vernon*, 35 Cal. 49; *Monday v. State*, 32 Ga. 672; S. C., 79 Am. Dec. 314; *Burns v. State*, 61 Ga. 192; *Mitchell v. State*, 71 Id. 128; *Lander v. People*, 104 Ill. 248; *State v. Thomas*, 30 La. Ann., pt. 1, 600; *Commonwealth v. McPike*, 3 Cush. 181; *Commonwealth v. Hackett*, 2 Allen, 136; *State v. Horan*, 32 Minn. 394; S. C., 50 Am. Rep. 583; *Harriman v. Stowe*, 57 Mo. 93; *Brownell v. Pacific R. R. Co.*, 47 Id. 239; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 402; *Boothe v. State*, 4 Tex. App. 202; *Reardon v. State*, 4 Id. 602; *Powers v. State*, 5 S. W. Rep. 153 (Tex.); *Fifield v. Richardson*, 34 Vt. 410; *Little's Case*, 25 Gratt. 921; *Jordan's Case*, 25 Id. 943; *Kirby v. Commonwealth*, 77 Va. 681; S. C., 46 Am. Rep. 747; *Crookham v. State*, 5 W. Va. 510; and see illustrations cited *infra*. In the recent English case of *Regina v. Bedingfield*, 14 Cox C. C. 341, however, the court refused to admit the exclamation of a woman, coming out of a house with her throat cut, giving the name of a person as having cut her throat, on the ground that it was a statement of a past transaction, though the injury had been inflicted but a moment before, and she was then hurrying for assistance. This decision at the time, 1879, occasioned much discussion, and a lengthy and able commentary upon it, in connection with the doctrine of *res gestæ*, will be found in the American Law Review, volume 14, page 817, and volume 15, pages 1, 71. In some of the United States the stricter rule of coincidence of time is insisted upon, notwithstanding it sometimes excludes illustrative evidence: See *Comstock v. Hadlyme*, 8 Conn. 263; *Ford v. Haskell*, 32 Id. 492; *Rockwell v. Taylor*, 41 Id. 56; *State v. Seymour*,

1 Houst. C. C. 508; *Mayer v. State*, 1 S. Rep. 733 (Miss.); *State v. Pomeroy*, 25 Kan. 349. See also *Jackson v. State*, 52 Ala. 305; *Beardstown v. Virginia*, 81 Ill. 541; *Commonwealth v. Harwood*, 4 Gray, 41; *Commonwealth v. James*, 99 Mass. 438; *Patterson v. South Carolina R. R. Co.*, 4 S. C. 153; *State v. Davidson*, 30 Vt. 377; and see *East Tennessee R. R. Co. v. Duggan*, 51 Ga. 212. And under this more stringent rule, a declaration made by one who had been assaulted or mortally wounded, a few minutes after the infliction of the injury, as to how and by whom the assault was committed, is not of the *res gestæ*, and not admissible: *State v. Daugherty*, 17 Nev. 376; *Mayer v. State*, 1 S. Rep. 733 (Miss.); and see cases *infra*. The following examples will illustrate how contemporaneous acts and declarations must be:—

Husband and Wife.—A husband in defense of an action for the board of his wife may show her declaration confessing adultery made immediately before he turned her off, and may also introduce letters from men, found about that time in her desk: *Waller v. Green*, 1 Car. & P. 621. And so where a person brings an action for enticing away his wife, her declarations made immediately before or at the time she left the plaintiff, concerning his cruel treatment of her, are admissible in behalf of the defendant: *Gilchrist v. Bale*, 8 Watts, 355; and the declarations of a husband at the time he abandoned his wife are competent as part of the *res gestæ*: *State v. Mertz*, 14 Mo. App. 55.

Domicile.—Upon a question of domicile, the declarations of the party whose home is in controversy, made at the time of his going and returning, may be received as evidence of his intention: *Gorham v. Canton*, 5 Greenl. 266; S. C., 17 Am. Dec. 231; *The Venus*, 8 Cranch, 278; *Richmond v. Thomaston*, 38 Me. 232; *Cornville v. Brighton*, 39 Id. 333; *State v. Winner*, 17 Kan. 298; *Thorndike v. Boston*, 1 Met. 242; *Kilburn v. Bennet*, 3 Id. 199; *Salem v. Lynn*, 13 Id. 544; *Porter v. Ferguson*, 4 Fla. 104; *Carroll v. State*, 3 Humph. 315; *Bateman v. Bailey*, 5 Term Rep. 512; *Rawson v. Haigh*, 2 Bing. 99; *Newman v. Stretch*, 1 Moody & M. 338; *Vacher v. Cocks*, 1 Id. 353; *Fellowes v. Williamson*, 1 Id. 306; *Ridley v. Gyde*, 9 Bing. 349, 352; *Smith v. Cramer*, 1 Bing. N. C. 585. So on a trial of an issue formed on an attachment, on the ground that the defendant had absconded, it having been shown that defendant was away from home when the attachment was sued out, it was competent to show, as part of the *res gestæ*, that he stated just before his departure that he was going to Alabama after certain property, and sought to borrow money to pay his expenses there and back, and that he did return: *Brady v. Parkes*, 67 Ga. 636. Again, letters written during an absence from home are admitted as explanatory of the motive of departure and absence, these being regarded as one continuous act: *Rawson v. Haigh*, 2 Bing. 99, 104; *New Milford v. Sherman*, 21 Conn. 101; *Marsh v. Davis*, 24 Vt. 363.

Torts.—Declarations coincident with torts, and illustrative of their nature, cause, or character, are admissible: *Regina v. Foster*, 6 Car. & P. 325; *Boston R. R. v. Dana*, 1 Gray, 83; *Parker v. Steamboat Co.*, 109 Mass. 449; *Troomley v. Railroad Co.*, 69 N. Y. 158; *Courtney v. Baker*, 34 N. Y. Sup. Ct. 29; *Harriman v. Stowe*, 57 Mo. 93; *Indianapolis R. R. v. Anthony*, 43 Ind. 183. Thus in an action against a steamboat company for injuries received by a passenger from the fall of a gangway from the wharf to the defendant's boat, it was permissible to show that men working at the gangway had been warned, immediately before the accident, that the plank was unsafe: *Parker v. Steamboat Co.*, 109 Mass. 449. So in an action against an insurance company for the loss of a vessel burned by military authorities, evidence was admitted regarding the orders set up by the persons who destroyed the vessel: *Marcy*

v. *Insurance Co.*, 19 La. Ann. 388. And in an action by a bailor against the bailee for a loss caused by the latter's negligence, the declarations of the bailee at the time of the loss are admissible in his favor to show the nature of the loss: *Story on Bailments*, sec. 339; *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Beardlee v. Richardson*, 11 Wend. 25; *Doorman v. Jenkins*, 2 Ad. & E. 256. And where, in an action for injury resulting from a surgeon's unskillfulness in treating a dislocation as a fracture, it was shown that if his diagnosis was correct a grating sound would have been heard on manipulation of the limb, it was held that evidence could be given of remarks made by by-standers at the time of the examination that they heard such a sound: *Hitchcock v. Burgett*, 38 Mich. 501. And the statement of a witness that, soon after the collision, he heard some one on board of the colliding vessel say, in a commanding tone, "Go ahead, and let her sink; it is nothing but a damned flat-boat, anyhow"; and that the vessel went on without rendering any assistance, — is admissible in evidence for the plaintiff in an action against the owners of the colliding vessel: *Otis v. Thom*, 23 Ala. 469; S. C., 58 Am. Dec. 303. So in an action against an employer for damages by the death of a young child, his servant, caused by his negligence, the declarations of the child, half an hour after the accident, as to the cause and as to the employer's conduct, are competent as *res gestæ*: *Augusta Factory v. Barnes*, 72 Ga. 217; S. C., 53 Am. Rep. 838. And so in a suit for enticing away a servant, the declarations of the servant at the time of leaving his master are admissible as part of the *res gestæ*, to show the reason and motive of his departure: *Hadley v. Carter*, 8 N. H. 40.

But a declaration which was made some months after a mine was located, and formed no part of the act of location, was inadmissible as part of the *res gestæ*: *Kramer v. Settle*, 1 Idaho, N. S., 485. And in an action for injuries to plaintiff's minor son from defendant's negligent handling of a pistol, a declaration of the son, made after the wound had been dressed and he had taken his seat in a buggy to be conveyed home, to the effect that defendant was not to blame, is not receivable as evidence in chief, being no part of the *res gestæ*: *Mutch v. Pierce*, 49 Wis. 231; S. C., 35 Am. Rep. 776. And an injured person's statement to his physician as to the cause and circumstances of his injury is not admissible as *res gestæ* if not made until he has been removed and the doctor called. So held in an action against a township for fatal injury caused by a defective bridge: *Merkle v. Bennington*, 58 Mich. 156; S. C., 55 Am. Rep. 666; see *East Tennessee & G. R. R. Co. v. Maloy*, 2 S. E. Rep. 941 (Ga.); *Waldele v. New York Cent. R. R. Co.*, 95 N. Y. 274; S. C., 47 Am. Rep. 41, reversing S. C., 29 Hun, 35.

Railroad Accidents and Injuries. — The conduct and exclamations of passengers on a railroad train at the time of an accident, though not in the presence of the party who receives an injury, are admissible as part of the *res gestæ* to justify the conduct of the party injured: *Galena etc. R. R. Co. v. Fay*, 16 Ill. 558; *Mobile R. R. v. Ashcraft*, 48 Ala. 15; *Indianapolis R. R. v. Anthony*, 43 Ind. 163. And where a person is killed in a railroad accident, in an action by his representatives against the company, his declarations made immediately after the injury may be received: *Entwistle v. Feighner*, 60 Mo. 214; *Harriman v. Stowe*, 57 Id. 93; *Elkins v. McKean*, 79 Pa. St. 493. And so the declarations of a switchman, made immediately after an accident by which he has been knocked down and run over, and while he is still under the car, touching the cause of the accident, are competent as part of the *res gestæ*. *Little Rock M. R. & F. R'y Co. v. Leverett*, 3 S. W. Rep. 50 (Ark.).

But in an action against a railroad company to recover damages for the

death of a person caused by the negligence of defendant, declarations of deceased explaining the manner in which the accident happened, made after the fatal injury was received, and while being conveyed from the scene of the accident, are not part of the *res gestæ*, and evidence thereof is inadmissible: *Martin v. New York etc. R. R. Co.*, 9 N. E. Rep. 505 (N. Y.); *Waldele v. New York Cent. etc. R. R. Co.*, 95 N. Y. 274, reversing S. C., 29 Hun, 35. So, also, in such an action a statement made by the person shortly before his death, but not at or about the time of the accident, to a physician, is held not admissible against the company, it not being admissible as part of the *res gestæ*, and the principle of dying declarations not applying to civil cases: *East Tennessee etc. R. R. Co. v. Maloy*, 2 S. E. Rep. 941 (Ga.). So in an action for injuries caused by being run over at a railroad crossing, statements of the plaintiff's driver as to the reason he did not see the train, made half an hour after the accident, and at a different place, are not admissible as part of *res gestæ*: *Pittsburgh etc. R'y Co. v. Wright*, 80 Ind. 182. And it has also been held that where a man was put off a railroad train and sustained an injury, his declarations made immediately afterwards were not part of the *res gestæ*: *Sullivan v. Oregon R'y & Nav. Co.*, 12 Or. 392; S. C., 53 Am. Rep. 364. But this seems to be an application of the stringent rule of coincidence of time.

Criminal Cases.—The declarations of third persons may be admissible if they are part of the *res gestæ*. Thus exclamations by a wife upon the killing of her son by her husband: "My God! My God! he has killed my boy! He struck him right over my shoulder!"—made in the presence and hearing of the husband, are admissible against him: *State v. Middleham*, 62 Iowa, 150. And so on trial of A for murder of B, an exclamation of C immediately after the fatal shot: "Don't strike him, for you have shot him now!"—is admissible as part of the evidence: *State v. Walker*, 78 Mo. 380; see also *Jordan's Case*, 25 Gratt. 943. But the declarations of a witness made half an hour before the commission of the crime are not a part of the *res gestæ*, unless they are a part of one continuous quarrel culminating in the crime: *Wood v. State*, 92 Ind. 269. So in a prosecution for robbery, testimony of defendant and two witnesses as to conversations between him and them on the night of the robbery, on his way from his shop to the place where the crime was committed, is not admissible as part of the *res gestæ*: *People v. Kalkman*, 13 Pac. Rep. 500 (Cal.) And in a prosecution for homicide, evidence that witness a day or two before the homicide heard defendant say that his son had told him that deceased was mad with him, and had threatened to kill him, is no part of the *res gestæ*: *State v. Unfried*, 76 Mo. 404. A party accused of the larceny of a gold piece told the officer that he would show him where it was concealed, and on being taken to his house, pointed out its hiding-place, and then said that the servant of the owner of the gold piece had given it to him. But this declaration was not part of the *res gestæ*: *Cooper v. State*, 63 Ala. 80. And on a trial for robbery, a statement by the person alleged to have been robbed, made some time after the occurrence, and not in defendant's presence, simply to the effect that he had been "knocked down and robbed," was inadmissible: *People v. Ehring*, 65 Cal. 135. So the declarations of the accused made after the crime, and while a coroner's jury is holding the inquest, are not part of the *res gestæ*: *State v. Rutledge*, 37 La. Ann. 378. And so where, upon a trial for murder, evidence was offered of a conversation heard three fourths of a mile away from the place of the murder between three men other than defendant, one of whom said: "You were fools to do it," and another replied: "If we had not done it, we should all have been hung,"—it was held that the evidence offered was no part of the

res gestæ, and was inadmissible: *Greenfield v. People*, 85 N. Y. 75; S. C., 39 Am. Rep. 636. And where a party is indicted for perjury for having falsely sworn in a previous prosecution that he had been shot by the person prosecuted, his declaration to the same effect, made shortly after the shooting took place, in explanation of a slight injury to the head, is not admissible in his favor on the trial for perjury. It was not a part of the *res gestæ* of either prosecution: *State v. Williams*, 34 La. Ann. 959.

We have seen that in some states a more liberal view, with respect to the requisite nearness in point of time prevails, than in others. Thus in the former, upon a trial of a prisoner for murder, a statement made by him a few minutes after the homicide, near the place, and in the hearing and presence of eye-witnesses of the homicide, who were not called by the commonwealth, is admissible for the prisoner as part of the *res gestæ*: *Little's Case*, 25 Gratt. 921. A was alone in his store when a man came in, and shot him through the head. A immediately ran out of his store to a door eighty feet away, and after knocking and being admitted said that B had shot him. It was held that the declaration was of the *res gestæ*, and admissible: *Kirby v. Commonwealth*, 77 Va. 681; S. C., 46 Am. Rep. 747; *Burns v. State*, 61 Ga. 192. So where a wounded man, within five minutes from the time he was shot, asked one of the persons who was assisting him what he shot him for, this question was of the *res gestæ*, and admissible: *Mitchell v. State*, 71 Ga. 128. And so where a few minutes after a man was waylaid, knocked down, and robbed, he described to a police officer the appearance of his assailants, this description was of *res gestæ*, and admissible: *State v. Horan*, 32 Minn. 394; S. C., 50 Am. Rep. 583. So on the trial of J. for assault with intent to murder F., F.'s exclamation, "Oh, Julia!" uttered, though half unconsciously, so soon as she, F., was found on the day of the assault, at the moment of the restoration of sensibility,—was a part of the *res gestæ*: *Johnson v. State*, 65 Ga. 94. John Simpson's wife was shot while walking with another woman. She exclaimed, "Simpson, you have shot me." The other woman saw a man running away. A man, hearing the shot, ran to her, and asked her who shot her, and she said, "John Simpson." Upon Simpson's trial for murder, it was held that these declarations were admissible as part of the *res gestæ*: *People v. Simpson*, 48 Mich. 474. Again, on a trial for murder, it appeared that deceased, the wife of defendant, was extremely jealous of him, and on the night of the homicide left her house saying: "There are two persons down the alley. I think it is Harp [defendant] and his sweetheart,"—and never returned, but was found murdered next morning near the place where she expected to meet defendant. Held, that her statement was admissible as part of the *res gestæ*: *Thomas v. State*, 67 Ga. 460. So on a trial for murder, testimony of a witness that the defendant, having fled on horseback immediately after the killing, the witness pursued him, and in about five minutes overtook him, and told him to hold up, and if he did not he would kill him; and that the defendant having held up, in reply to witness's statement that he must go back to town with him, and that he had killed the deceased, stated if he did, nobody saw him,—is admissible as part of the *res gestæ*, although the confession was made at a time when the defendant was under arrest, and in fear of death: *Powers v. State*, 5 S. W. Rep. 153 (Tex.). And on a trial for a robbery in a bank, where the defense was an *alibi*, and there was evidence that a masked robber struck the president of the bank upon the head with a pistol, the state was properly allowed to prove, over the objection of the accused, that on the night after the robbery the latter was armed with a Colt's revolver, the rod of which was bent as if by a blow: *Reardon v.*

State, 4 Tex. App. 602. In *Lander v. People*, 104 Ill. 248, the laxity in the requisite of coincidence of time is carried even further. In that case, two girls fifteen years old were twenty-five yards from where a rape was committed in broad daylight. They saw the man run away, but had a side-view of his face. The next day they were near the same place, when a man passed. One girl exclaimed: "There goes the man," and the other replied: "Yes, there he goes." And it was held that the exclamation and reply were admissible.

On the other hand, in the states where the more stringent rule prevails, declarations such as the above would not be admitted. In *People v. Ah Lee*, 60 Cal. 85, the defendant was tried for killing A by stabbing him. After A was stabbed, he ran, and while running, cried "Murder," and said defendant had stabbed him. A witness who saw him run and heard him cry was asked by the prosecuting attorney whether, "immediately after" running, A said that defendant had stabbed him. But this was held inadmissible, as not referring to a declaration that was part of the *res gestæ*. So declarations made by A, from three to five minutes after an assault upon him in his house by B, armed with a musket, with intent to kill and rob, to those who ran in, alarmed by A's cries, to render assistance, were held inadmissible, as being hearsay, and not of the *res gestæ*: *State v. Pomeroy*, 25 Kan. 349. And where a party declared, after he had gone two hundred yards from the scene of the shooting, to a party who had not been a witness of it, and knew nothing of it, that the shooting was accidental on his part, it was held that this declaration was not part of the *res gestæ*: *State v. Seymour*, 1 Houston's Crim. Code, 508. The declarations of a person who had been fatally wounded, made at a place to which he had fled, to a witness by whom he was found, about five minutes after he was cut, as to how and by whom he was cut, were held inadmissible on a murder trial as part of the *res gestæ*: *Mayes v. State*, 1 S. Rep. 733 (Miss.). And declarations made by one who had been assaulted, a few minutes after the difficulty, to the effect that the defendant committed the assault, were not of the *res gestæ*, and were inadmissible: *State v. Daugherty*, 17 Nev. 376.

DECLARATIONS NOT ADMISSIBLE, IF PREMEDITATED AND NOT SPONTANEOUS.—If the declarations sought to be proved are made so far previous to the transaction in question as to give an opportunity for their manufacture or concoction, for the purpose of evidence, or if the circumstances show that they were uttered with this purpose, they are inadmissible: *Rosenbaum v. State*, 33 Ala. 354; *Lee v. Hester*, 20 Ga. 588; *Williams v. English*, 64 Id. 546; *Lander v. People*, 104 Ill. 248; *Wadsworth v. Harrison*, 14 Iowa, 272; *Bangor v. Brunswick*, 27 Me. 351; *Stone v. Segur*, 11 Allen, 568; *Rowell v. Lowell*, 11 Gray, 420; *Gamble v. Johnson*, 9 Mo. 605; *State v. Dominique*, 30 Id. 585; *Wabrod v. Ball*, 9 Barb. 271; *Smith v. Betty*, 11 Gratt. 752. The act or declaration sought to be proved must negative any premeditation or purpose to manufacture testimony: *Lander v. People*, 104 Ill. 248. Thus upon the trial of an issue as to whether certain notes were paid, the testimony of the party claiming to have paid them that, in the absence of the other party, he threw them into a stove, calling the attention of by-standers to the fact that they were the notes in controversy, is inadmissible, as is similar testimony on the part of the by-standers: *Cummings v. Leighton*, 9 Ill. App. 186.

And likewise declarations, made so long after the principal transaction as to give an opportunity for premeditation, can form no part of the *res gestæ*, as they lack spontaneity and instinctiveness. Though it is not always essential that they should be absolutely coincident in point of time with the main event, "they must be concomitant with the principal act, and so connected

with it as to be regarded as the mere result and consequence of the co-existing motives in order to form a proper criterion for directing the judgment which is to be formed upon the whole conduct": 1 Greenl. on Ev., sec. 110; *Doe v. Webber*, 1 Ad. & E. 733; *Walton v. Green*, 1 Car. & P. 621. And therefore declarations which are merely in the nature of a narrative of past occurrences are inadmissible: *Hyde v. Palmer*, 3 Best & S. 657; *Peacock v. Harris*, 5 Ad. & E. 449; *Lees v. Martin*, 1 Moody & R. 210; *Harrison v. Harrison*, 9 Ala. 73; *Chaney v. State*, 31 Id. 342; *McAdams v. Beard*, 35 Id. 478; *Webb v. Kelly*, 37 Id. 333; *Hall v. State*, 40 Id. 698; *Brand v. Abbott*, 42 Id. 499; *Innis v. Steamer Senator*, 1 Cal. 459; S. C., 54 Am. Dec. 306; *Whitney v. Durkin*, 48 Cal. 462; *Rockwell v. Taylor*, 41 Conn. 55; *Hart v. Powell*, 18 Ga. 635; *Rutland v. Hathorn*, 36 Id. 380; *Gardner v. People*, 4 Ill. 83; *Cross v. People*, 47 Id. 152; *Lander v. People*, 104 Id. 248; *Dickes v. State*, 11 Ind. 557; *Simmons v. Norwood*, 21 La. Ann. 421; *Wilson v. Sherlock*, 36 Me. 295; *Battles v. Bachelder*, 39 Id. 19; *Stewart v. Redditt*, 3 Md. 67; *Boyd v. Moore*, 11 Pick. 362; *O'Kelly v. O'Kelly*, 8 Met. 436; *Stiles v. Western R. A. Corp.*, 8 Id. 44; *Salem v. Lynn*, 13 Id. 544; *Johnson v. Sherwin*, 3 Gray, 374; *Commonwealth v. Jacques*, 99 Mass. 438; *State v. Jackson*, 17 Mo. 544; *Stowe v. Schneider*, 35 Id. 533; *Banfield v. Parker*, 36 N. H. 353; *Osborn v. Robbins*, 37 Barb. 481; *Spatz v. Lyons*, 55 Id. 476; *People v. Davis*, 56 N. Y. 102; *State v. Black*, 6 Jones, 510; *Cleveland R. R. v. Mara*, 26 Ohio St. 185; *Reed v. Dick*, 8 Watts, 479; *Young v. Commonwealth*, 28 Pa. St. 501; *Raiford v. French*, 11 Rich. 367; *Parkey v. Yeary*, 1 Heisk. 157; *Riggs v. State*, 6 Col. 517; *Barnum v. Hackett*, 35 Vt. 77; *Hopkins v. Richardson*, 9 Gratt. 485. Thus the declaration of a party as to how his hands became bloody, being narrative of a past event, is inadmissible: *Scaggs v. State*, 8 Smedes & M. 22. The declarations of a defendant subsequent to the commission of the offense, if wanting in spontaneity and instinctiveness, are but the party talking about the facts, and not "the facts speaking through the party." They therefore form no part of the *res gestae*, but are self-serving declarations, and as such are properly rejected as evidence: *Jones v. State*, 3 S. W. Rep. 30 (Tex.). In *Felt v. Amidon*, 43 Wis. 242, the action was brought to recover damages for enticing the plaintiff's unmarried minor daughter from his house, and taking her to a brothel in Milwaukee; and it was held erroneous to exclude declarations of the daughter made at a hotel in Milwaukee before she was taken by the defendants to the house where they left her, as these declarations were part of the *res gestae*. And it was equally erroneous to admit her declarations made at the latter place after she had been left there, for the act of enticing terminated at that time. The declarations at the hotel were part of the act charged; but those made afterwards were merely narrative. In *Galveston v. Barbour*, 62 Tex. 172, S. C., 50 Am. Rep. 519, which was an action by a father against the city of Galveston for damages for injuries to his child causing death, it appeared that the child died, as alleged, from an injury received from a bolt carelessly left projecting from the curb of the city sidewalk. Immediately after the injury, he told his mother the cause thereof, weeping from pain at the time; and the next day he told his father. The latter testified to his son's declaration to him, and that he and the son together went to see the bolt because of that declaration, and found drops of blood on it. It was held, however, that though the declaration to the mother was competent, that to the father was not. For the same reason, — that is, because of the chance for deliberation and the manufacture of evidence, — a letter written by a party was inadmissible in his behalf, though written immediately after the transaction: *Small v. Gillman*, 48 Me. 506. This rule

does not, however, apply to exclamations and instinctive declarations regarding bodily health or mental condition: See *infra*.

DECLARATIONS ARE NOT ADMISSIBLE UNLESS ACTS WHICH THEY EXPLAIN ARE ALSO ADMISSIBLE; and the act must be first established before the illustrative declarations can be admitted: *Gilbert v. Gilbert*, 22 Ala. 529; *Fail v. McArthur*, 31 Id. 26; *Comins v. Comins*, 21 Conn. 413; *People v. Williams*, 3 Park. Cr. 84; *Carleton v. Patterson*, 29 N. H. 580; *Morrill v. Foster*, 32 Id. 358; *Ordway v. Sanders*, 58 Id. 132; *Weimore v. Mell*, 1 Ohio St. 26; S. C., 59 Am. Dec. 607. Thus, unless the condition of a party's mind is in issue, a declaration is inadmissible to show a mere intent not carried into effect: *Hale v. Taylor*, 45 N. H. 405. In *Lund v. Tyngsborough*, 9 Cush. 36, which was an action to recover for injuries received from a defect in a highway, the statements of a doctor, since deceased, made during an examination of the party a long time after the injury, with respect to the nature of the injury were inadmissible because the fact of the examination was irrelevant to the plaintiff's case: See also *Ordway v. Sanders*, 58 N. H. 132; *People v. Williams*, 3 Abb. App. 596. And so the fact of insolvency must be proved in order to admit statements of the insolvent to show that he was aware of his embarrassed circumstances: *Thomas v. Connell*, 4 Mees. & W. 261-270; *Craven v. Halleley*, cited 4 Id. 270; *Vacher v. Cocks*, Moody & M. 353. But the intent of an alleged bankrupt in leaving home may be proved by his declarations made at the time after proof of the fact of his departure: *Roush v. Railroad Co.*, 1 Q. B. 51, 62, 63; S. C., 4 Perry & D. 686; *Newman v. Stretch*, Moody & M. 338; *Ex parte Bamford*, 15 Ves. 449; *Robson v. Rolls*, 9 Bing. 648.

EXCLAMATIONS OF PAIN AND DECLARATIONS RESPECTING INJURIES. — Statements of a sick person when the nature of his illness is in issue, made to a physician or other attendant during his sickness, and relative to the nature, symptoms, and effect thereof, are admissible: *Aveson v. Kinnaird*, 6 East, 188; *Roberts v. Graham*, 6 Wall. 578; *Insurance Co. v. Mosley*, 8 Id. 397; *Johnson v. State*, 17 Ala. 618; *Phillips v. Kelly*, 29 Id. 628; *Sanders v. Reister*, 1 Dak. 151; *Illinois R. R. v. Sutton*, 42 Ill. 438; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138; *Gray v. McLaughlin*, 26 Iowa, 279; *Commonwealth v. McPike*, 3 Cush. 181; *Bacon v. Charlton*, 7 Id. 581; *Fay v. Harlan*, 128 Mass. 244; *Johnson v. McKee*, 27 Mich. 471; *Elliott v. Van Buren*, 33 Id. 49; *Harriman v. Stowe*, 57 Mo. 93; *Brown v. Railroad Co.*, 66 Id. 538; *Howe v. Plainfield*, 41 N. H. 135; *Perkins v. Railroad Co.*, 44 Id. 223; *Towle v. Blake*, 48 Id. 92; *Taylor v. Railroad Co.*, 48 Id. 304; *Caldwell v. Murphy*, 1 Duer, 233; *Baker v. Griffin*, 10 Bosw. 140; *Caldwell v. Murphy*, 11 N. Y. 416; *People v. Williams*, 3 Park. Cr. 84; *Matteson v. New York etc. R. R. Co.*, 62 Barb. 364; *Dabbert v. Insurance Co.*, 2 Cin. Rep. 98; *State v. Glass*, 5 Or. 73; *Gilchrist v. Bale*, 8 Watts, 355; *Stiles v. Danville*, 42 Vt. 282; *Earl v. Tusper*, 45 Id. 275; *State v. Howard*, 32 Id. 380. And in *Nichols v. Brooklyn City R. R. Co.*, 30 Hun, 437, it was held, Pratt, J., dissenting, that in a suit to recover damages for the defendant's negligence, a witness might testify that three months after the accident plaintiff, with whom the witness slept, would sit upon the edge of the bed and complain of pain in her arm and shoulder. But exclamations of present pain and declarations of present symptoms only are admissible. All statement relative to past transactions, no matter how closely connected with the present sickness, are inadmissible. And therefore the statements of the sick person as to the cause of the sickness or injury are usually rejected: *Smith v. State*, 53 Ala. 486; *Illinois Central R. R. Co. v. Sutton*, 42 Ill. 438; S. C., 92 Am. Dec. 81; *Collins v. Waters*, 54 Id. 485; *Carthage Turnpike Co. v. An-*

draws, 102 Ind. 138; *Rossa v. Boston Loan Co.*, 132 Mass. 439; *Morrissey v. Ingham*, 111 Id. 63; *Ashland v. Marlborough*, 99 Id. 47; *Grand Rapids etc. R. R. Co. v. Huntley*, 38 Mich. 537; *Lush v. McDaniel*, 13 Ired. 485; S. C., 57 Am. Dec. 566; *Denton v. State*, 1 Swan, 279; and whatever is said in *Barber v. Merriam*, 11 Allen, 322, is merely *orbiter dictum*. So such statements are inadmissible if made after convalescence, or when there has been an opportunity for deliberation or of consideration with respect to prospective litigation: See *Matteson v. Railroad Co.*, 35 N. Y. 847; *Spatz v. Lyons*, 55 Barb. 476; *Murphy v. Railroad Co.*, 66 N. Y. 125; *Hunt v. People*, 3 Park. Cr. 569; *Chapin v. Marlborough*, 9 Gray, 244; *Kennard v. Burton*, 25 Me. 30; *Gray v. McLaughlin*, 26 Iowa, 279; *Lush v. McDaniel*, 13 Ired. 485; S. C., 57 Am. Dec. 566. Thus in an action for the carnal knowledge of the plaintiff obtained by force, and by reason of which she contracted a venereal disease, her statements to a physician three months afterward, were excluded: *Morrissey v. Ingham*, 111 Mass. 63. But if the statements form the basis of the opinion of a physician as an expert, respecting the physical condition of the party, they are sometimes received: *Barber v. Merriam*, 11 Allen, 322; *Rogers v. Crain*, 30 Tex. 284. See *Filer v. Railroad Co.*, 49 N. Y. 42; *Rowell v. Lowell*, 11 Gray, 420; *Moody v. Sabin*, 9 Cush. 505. A physician asked to give his opinion as to the cause of a patient's condition at a particular time must necessarily be guided to some extent in forming his opinion by what the sick person may have told him in detailing his pains and sufferings, and his opinion founded in part upon such *data* may be received in evidence; and he may even state what his patient said in describing his bodily condition, if it was said under such circumstances as free it from all suspicion of being spoken with reference to future litigation, and give it the character of *res gestæ*; but the physician cannot give in evidence the mere statement of the party injured in lieu of his own professional opinion: *Illinois Central R. R. Co. v. Sutton*, 42 Ill. 438; S. C., 92 Am. Dec. 81. So declarations made to a physician respecting bodily feelings and symptoms of pregnancy at the time of examination are admissible as part of the facts on which his opinion is founded. But after he has been cross-examined as to such declarations, he cannot be re-examined as to other unconnected assertions in the same conversation charging defendant with criminal acts to produce miscarriage: *State v. Geddicke*, 43 N. J. L. 86. Such declarations have been received to prove the condition of a person's health before an alleged poisoning: *Rez v. Johnson*, 2 Car. & K. 354; *Rez v. Blandy*, 18 How. St. Tr. 1135. But if the patient is not a party, his declarations cannot be received: *Ashland v. Marlborough*, 99 Mass. 47; see, however, *Rogers v. Crain*, 30 Tex. 289.

The nature and character of an injury, it is well settled, may be explained and illustrated by exclamations of pain and terror uttered at the time the injury was received or immediately thereafter, and they are therefore admissible in an action for damages for the injury: *Aveson v. Kinnaird*, 6 East, 188; *Rez v. Blandy*, 18 How. St. Tr. 1135; *Rez v. Guttridge*, 9 Car. & P. 472; *Hall v. Steamboat Co.*, 13 Conn. 319; *Bacon v. Charlton*, 7 Cush. 581; *Commonwealth v. Fanno*, 134 Mass. 217; *Grand Rapids etc. R. R. Co. v. Huntley*, 38 Mich. 537; *Brownell v. Railroad Co.*, 47 Mo. 239; *Harriman v. Stowe*, 57 Id. 93; *Entwistle v. Feigner*, 60 Id. 214; *Green v. Bedell*, 48 N. H. 546; *Matteson v. New York Cent. R. R. Co.*, 35 N. Y. 487; S. C., 91 Am. Dec. 67; *Brown v. New York Cent. R. R. Co.*, 32 Id. 597; S. C., 88 Am. Dec. 353; *Werely v. Persons*, 28 Id. 344; S. C., 84 Am. Dec. 346, and note 348; *Maine v. People*, 9 Hun, 117; *Spatz v. Lyons*, 55 Barb. 476; *Houston etc. R. R. Co. v. Shafer*, 54 Tex. 641; *Frink v. Coe*, 4 G. Greene, 555; S. C., 61 Am. Dec. 141. In

Powers v. West Troy, 25 Hun, 561, the plaintiff sued a town to recover damages sustained from being thrown from a cutter by reason of a defect in the highway; and it was held that one who was with him in the cutter might testify that immediately after the accident, as plaintiff got into the cutter again, he said that he was badly hurt. The usual complaints of pain as the natural concomitants of physical injury are regarded as verbal acts, proof of which is competent when relevant to the issue: *Sanders v. Reister*, 1 Dak. 151. But if such exclamations are too remote from the accident to be part of the *res gestæ* they will be inadmissible: *Waldele v. Hudson River R. R. Co.*, 19 Hun, 72. In life insurance cases the opinion of the assured as to his health may sometimes be shown by his declarations: See *Aveson v. Kinaird*, 6 East, 188; *Witt v. Klindworth*, 3 Swab. & T. 143; *Edington v. Insurance Co.*, 67 N. Y. 185; *Dilleber v. Insurance Co.*, 69 Id. 256; *Swift v. Insurance Co.*, 63 Id. 186.

STATE OF MIND. — Where the state of a person's mind, his sentiments, or disposition at a certain time is the subject of inquiry, his statements and declarations at that period are admissible: *Barthelemy v. People*, 2 Hill, 248, 257; *Hester v. Commonwealth*, 85 Pa. St. 139; *Wetmore v. Mell*, 1 Ohio St. 26. See also *Edgar v. McArn*, 22 Ala. 796; *Liles v. State*, 30 Id. 24; *People v. Shea*, 8 Cal. 538; *Buttram v. Jackson*, 32 Ga. 409; *Welsh v. Louis*, 31 Ill. 446; *Knowlton v. Clark*, 25 Ind. 395; *Howe v. Howe*, 99 Mass. 88; *Kearney v. Farrell*, 28 Conn. 317; *Roach v. Lehring*, 59 Pa. St. 74. So the declarations of a testator may be received to show that his mind was under undue influence at the time of making the will: *Milton v. Hunter*, 13 Bush, 163; *Lucas v. Cannon*, 13 Id. 650; see *Batton v. Watson*, 13 Ga. 63; S. C., 58 Am. Dec. 504. And so when the question is as to the extent of a mental disease, the declarations of the person affected are admissible: See *Rez v. Johnson*, 3 Car. & K. 354; *Howe v. Howe*, 99 Mass. 88; *State v. Kring*, 64 Mo. 591; *Perkins v. Railroad Co.*, 44 N. H. 223; 1 Wharton and Stillé's Med. Jur., sec. 286.

MOTIVE AND PURPOSE OF ACT. — The motive, character, and object or purpose of an act are frequently indicated by what was said by the person doing the act at the time. Such statements are of the *res gestæ*, are of the nature of verbal acts, and are admissible in evidence with the main transaction which they illustrate: *Bateman v. Bailey*, 5 Term Rep. 512; *Liles v. State*, 30 Ala. 24; *People v. Shea*, 8 Cal. 538; *State v. Lewis*, 45 Iowa, 20; *Stephen v. McCloy*, 36 Id. 659; *Duling v. Johnson*, 32 Ind. 155; *State v. Hays*, 22 La. Ann. 39; *Hadley v. Carter*, 8 N. H. 40; *Barnes v. Allen*, 1 Keyes, 390; *Gilchrist v. Bale*, 8 Watts, 355; *Garber v. State*, 4 Cold. 161; *Williams v. State*, 4 Tex. App. 5; *Booth v. State*, 4 Id. 202; *Foster v. State*, 4 Id. 246; *Harrall v. State*, 4 Id. 427; *Allen v. State*, 4 Id. 581. So evidence of a distinct offense of the same nature as that for which the defendant is being tried is not ordinarily admissible, but it may be received if it goes to show *scienter*, intent, or motive, or to make out the *res gestæ*, or establish identity: *Ingram v. State*, 39 Ala. 247; S. C., 84 Am. Dec. 782. See also *supra*, "Facts as Well as Declarations," etc. Thus on a trial for a cattle theft, evidence of the theft of other cattle than those charged may be considered, if alike involved in the *res gestæ*, to show guilty knowledge and intent: *Brown v. State*, 9 Tex. App. 81; *State v. Murphy*, 84 N. C. 742. And on a trial of A for a rape upon B, it was held that the circumstances of an assault by A upon C, B's father-in-law, when C came to her rescue during her struggle with A, were part of the *res gestæ*, and B might testify that C was dead at the time of the trial: *Thompson v. State*, 11 Tex. App. 61.

Declarations showing motive and purpose very frequently form part of the *res gestæ*. Thus declarations of the defendant, made at the time of passing other counterfeit notes, are admissible as part of the *res gestæ*: *McCartney v. State*, 3 Ind. 353; S. C., 56 Am. Dec. 510. Declarations of the accused, made before the alleged stealing, that the property was his own, were held to be admissible in his behalf as part of the *res gestæ*: *State v. Thomas*, 30 La. Ann., pt. 1, 600. So where A and B were jointly indicted for stealing a hog, and upon a severance A was convicted; and upon B's trial he offered to prove by a competent witness that A, in the presence of the witness, asked B to go to A and get his hog, the inference being that B supposed the hog to belong to A, — the testimony was rejected on the ground that A having been convicted of an infamous crime, his statements were inadmissible. But it was held on appeal that the evidence was of the *res gestæ*, and was competent, and that A's infamy had nothing to do with it: *State v. Dellwood*, 33 La. Ann. 1229.

In a suit for damages for assault and battery, evidence of what the parties said during the altercation which was followed by the assault is admissible. And all the words and acts of the parties, and not detached words and sentences, should go to the jury. And also declarations of a by-stander, made during the progress of such altercation, if necessary to a full understanding of the character of the act complained of, may be received: *Baker v. Gausin*, 76 Ind. 317. So where a boy, who had driven against a foot-passenger on the street, immediately stopped his horse and came back and said he "did not mean to," the declaration was held a part of the *res gestæ*: *Clarkland v. Newsom*, 45 Mich. 62.

In *Robinson v. State*, 57 Md. 14, the accused was on trial for abducting several young children of A. It appeared that the accused went to A's house during his absence and drove away a wagon in which were A's wife, children, and furniture. The evidence for the prosecution tended to show that the wife and children went with the accused through fear of violence induced by his threats. For the defense the testimony of the occupant of a house at which the party stopped over night was offered to show that the wife said she left home voluntarily, taking the children and furniture with her, and herself getting defendant to drive the wagon; and that she was not going to live longer with her husband; and it was held that this evidence was admissible. So where two persons are sued for an assault committed in seizing a runaway apprentice, it may be proved that one of them told the other at the moment of the collision not to hurt the runaway: *Williams v. Jarrot*, 1 Gilm. 120. When the question is whether the defendant had absconded, his declarations at the time of his departure are evidence in his favor: *United States v. Penn*, 13 Nat. Bank. Reg. 4. And in an action for enticing away a servant, the declarations of the servant at the time of leaving are of the *res gestæ*: *Hadley v. Carter*, 8 N. H. 40. And so when the *bona fides* of a transaction are the subject of inquiry, the instinctive and unpremeditated declarations of the parties, or their agents, pending the negotiations, may be received: *Banfield v. Parker*, 36 Id. 353; *Zabriskie v. Smith*, 13 N. Y. 322. Where a married woman seeks to avoid a deed on the ground of duress and coercion, she may show her husband's threats and her resulting fear: *Central Bank v. Copeland*, 18 Md. 305. And on the same ground, in an action for adultery, what the husband and wife had said to each other, and letters written by one party to the other, when there was no reason to suspect collusion, were admitted to show the terms on which they lived: *Trelawney v. Coleman*, 1 Barn. & Ald. 90; see *Willis v. Bernard*, 8 Bing. 376; *Winter v. Wroot*, 1 Moody & R. 404; *Taylor's Evidence*, sec. 520. The declarations of the owner of land, as to

whether he intended to lay out a public road through it, are admissible to show that such road was not laid out: *Tait v. Hall*, 12 Pac. Rep. 391 (Cal.). And so to prove that the destruction of a will was procured by undue influence, evidence showing what took place in the sick-room between the time the will was sent for and its return and destruction, and also showing the motive by which the party exerting the undue means was influenced, is admissible as part of the *res gestæ*: *Batton v. Watson*, 13 Ga. 63; S. C., 58 Am. Dec. 504.

The admission of declarations such as these, however, for the purpose of showing motive and intention, whether written or verbal, depends much on circumstances, and upon the nearness or distance of time to the declarations made and the acts done: *Doyle v. Clark*, 1 Flip. 536.

DECLARATIONS OF PERSON IN POSSESSION OF PROPERTY, explaining and characterizing that possession, and showing in what capacity he holds, whether as owner solely or jointly, or as the agent, tenant, or trustee of another, and the like, are regarded as the *res gestæ* of the possession; and when that or the ownership of the property are under inquiry, such declarations are received as explanatory of the possession: *Davies v. Pierce*, 2 Term Rep. 53; *Doe v. Rickarby*, 5 Esp. 4; *Doe v. Payne*, 1 Stark. 86; *Norton v. Pettibone*, 7 Conn. 319; *Avery v. Clemons*, 18 Id. 306; S. C., 46 Am. Dec. 323; *Abney v. Kingsland*, 10 Ala. 355; *Daggett v. Shaw*, 5 Met. 223; *Long v. Colton*, 116 Mass. 414; *Fellows v. Smith*, 130 Id. 378; *Aberl v. Van Gelder*, 36 N. Y. 513; *Sweetenham v. Leary*, 18 Hun, 284; *Happy v. Mosher*, 47 Barb. 501; *Stark v. Boswell*, 6 Hill, 405; *Blake v. White*, 13 N. H. 267; *Smith v. Powers*, 15 Id. 546, 563; *Hall v. Young*, 37 Id. 134; *Bender v. Pitzer*, 27 Pa. St. 333; *York Bank v. Carter*, 38 Id. 446; *Lloyd v. Farrell*, 48 Id. 73; *Black v. Thornton*, 30 Ga. 361; *State v. Schneider*, 35 Mo. 533. Thus the declarations of a person in possession of goods, made while she was at work on them, that they belonged to the plaintiff, are competent evidence to show title: *Bradley v. Spofford*, 23 N. H. 444; S. C., 55 Am. Dec. 205. So in a suit by an administrator to recover personal property alleged to belong to the deceased, declarations by the latter, while in possession, that he owned it, are admissible as part of the *res gestæ*: *McConnell v. Hannah*, 96 Ind. 102. If one makes a deed, and afterwards retains possession of the property in a manner inconsistent with the terms of the deed, his declarations in reference to the ownership of the contract, or the terms upon which he holds possession, are admissible in evidence as part of the *res gestæ*; but otherwise where his possession is consistent with the terms of the deed or contract: *Williamson v. Williams*, 11 Lea, 355. Under an indictment for larceny, statements by defendant while in possession of the property, explanatory of that possession, are admissible as part of the *res gestæ*: *Allen v. State*, 73 Ala. 23. And a statement made by a person not suspected of theft, and before any search made, accounting for the possession of property which he is afterwards charged with having stolen, is admissible in his favor: *Rex v. Abraham*, 2 Car. & K. 550. The declaration of a person in possession of property, that it belonged to another, is competent for the plaintiff in an action of detinue, as forming part of the *res gestæ*, connected with and explanatory of the possession; but if he hold as guardian or trustee, such a declaration would be inadmissible against the ward or *cestui que trust*: *Nelson v. Iverson*, 24 Ala. 9; S. C., 60 Am. Dec. 442. So where, in trover by a woman for a horse and other chattels alleged to have been given her by her husband, but seized and sold under a mortgage given by him, she testified that after he gave her the chattels she gave directions for the keeping of the horse, and controlled it, it was held that this was admissible as part of

the *res gestæ*, that her statement that he gave her the chattels was not that of a conclusion of law merely, and that the question of a change of possession must be determined by the circumstances of the case, upon a fair preponderance of evidence: *Davis v. Zimmerman*, 40 Mich. 24.

Where the question was whether certain property taken under execution belonged to the judgment debtor, the statements by the debtor to a clerk employed by him as to whom he was employed for were admissible as part of the *res gestæ*: *Sweet v. Wright*, 57 Iowa, 510. Any creditor has a right to know whether a person in possession of property has any claim hostile to his right to levy on it; and the declarations of employees in charge in their employer's absence, made in reply to inquiries by his creditors, are admissible, as in the nature of *res gestæ*, to explain a possession of chattels claimed to be held under an unrecorded bill of sale to one whose rights are kept secret: *Haynes v. Leppig*, 40 Mich. 602. And in an action of trover against a sheriff for attaching certain property as the property of a certain person who was at the time the guardian of the plaintiff, the defendant may introduce the declarations of the guardian concerning the ownership of the property purchased by him, made at the time of such purchase, as part of the *res gestæ*: *Tenney v. Evans*, 14 N. H. 343; S. C., 40 Am. Dec. 194.

But declarations of a servant in the possession of chattels attached for his debt, that they are his property, are not admissible against his master in an action against the attaching officer: *Abbott v. Hutchins*, 14 Me. 390; S. C., 31 Am. Dec. 59. And these declarations, to be admissible, must be confined to the nature and character of the possession; and whatever goes further than this is not *res gestæ*: *Abney v. Kingsland*, 10 Ala. 355; S. C., 44 Am. Dec. 491. Therefore, declarations in regard to the contract by which the declarant acquired possession are not admitted: *Thompson v. Mawhinney*, 17 Ala. 362; S. C., 52 Am. Dec. 176. And statements by the party in possession of certain property that the business was his, and was only run in his father's name for protection, were held to be inadmissible, as being something more than merely explanatory of the possession: *Sweet v. Wright*, 57 Iowa, 510. So statements made by a defendant in ejectment at the time of paying rent, and accompanying the act of payment, are part of the *res gestæ*, and are admissible in evidence to illustrate the character of the transaction and explain the intent and object of the party; but his statements then made about other matters, such as the payment of a mortgage, or the title of former owners of the land, are not part of the *res gestæ*, and are not admissible: *Rigg v. Cook*, 4 Gilm. 336; S. C., 46 Am. Dec. 462.

Declarations of a person in possession of real or personal property, showing that he holds in his own right, or in subordination to the title of another, constitute part of the *res gestæ*: *Darling v. Bryant*, 17 Ala. 10; S. C., 52 Am. Dec. 162; *Poorman v. Miller*, 44 Cal. 269; *Little v. Libby*, 2 Greenl. 243; *West Cambridge v. Lexington*, 2 Pick. 536; *Marcy v. Stone*, 8 Cush. 4; S. C., 4 Am. Dec. 736; *Stearns v. Hendersass*, 9 Cush. 497; S. C., 67 Am. Dec. 65; *Plimpton v. Chamberlain*, 4 Gray, 320; *Potts v. Everhart*, 26 Pa. St. 493; *St. Clair v. Shale*, 20 Id. 105; *Doe v. Campbell*, 1 Ired. 482; *Hurt v. Evans*, 49 Tex. 311; *Beecher v. Parmele*, 9 Vt. 352; S. C., 31 Am. Dec. 633; *Bowen v. Chase*, 98 U. S. 254; *Peaceable v. Watson*, 4 Taunt. 16, 17; *Doe v. Pettitt*, 5 Barn. & Ald. 223; *Carne v. Nicoll*, 1 Bing. N. C. 430. And the declaration of a person in possession of land, that he took possession as agent of another, is admissible in evidence as part of the *res gestæ*, in an action against his alleged principal: *Kirkland v. Trott*, 66 Ala. 417. But the declarations of a party in possession of land, and proved to be a tenant, are not admissible against the landlord

without bringing home to the latter notice of them. But with such notice, they might go to show a repudiation of his tenancy, and the setting up of adverse possession and claim: *Ingram v. Little*, 14 Ga. 173; S. C., 58 Am. Dec. 549.

Declarations of owners in possession of land, with respect to its boundaries, are admitted: *Brewer v. Brewer*, 19 Ala. 481; *Norton v. Pettibone*, 7 Conn. 319; *Davis v. Campbell*, 1 Ired. 482; *Aberl v. Van Gelder*, 36 N. Y. 513; *Swettenham v. Leary*, 18 Hun, 284. See also *Hart v. Evans*, 49 Tex. 311. Though in Massachusetts the declarant must be deceased: *Long v. Colton*, 116 Mass. 414; *Morrill v. Titcomb*, 8 Allen, 100; *Adams v. Swansea*, 116 Mass. 591; *Fellows v. Smith*, 130 Id. 378; and see *Bender v. Pitzer*, 27 Pa. St. 333; *Potts v. Everhart*, 26 Id. 493; *Hunnicutt v. Peyton*, 102 U. S. 333, 364. And the declarations of an adjoining owner in fixing a boundary are admissible as part of the *res gestæ*: *Deming v. Carrington*, 12 Conn. 1; S. C., 30 Am. Dec. 591. But declarations accompanying the act of parting with the title and possession of land, as to the boundaries thereof, are not within the rule that declarations accompanying the act of possession and explanatory thereof, if made in good faith, are admissible as part of the *res gestæ*: *Lanipe v. Kennedy*, 60 Wis. 110.

The declaration of a person in the possession of property that he holds jointly with another is admissible to show the joint ownership of the other: *Darling v. Bryant*, 17 Ala. 10; S. C., 52 Am. Dec. 162. And so in an action against a surviving partner for goods sold, declarations of the deceased partner while in possession of the goods, as to whether they were his own or held by him jointly with another, were admissible as part of the *res gestæ* of possession, but not to show the fact of partnership unless known to defendant: *Humes v. O'Bryan*, 74 Ala. 64. While a mere hearsay or declaration is not admissible as evidence to prove facts, yet when there is a claim and an assertion of ownership which can only be proved by acts and words of the claimant, such acts and accompanying words stand on the same footing, and are admissible for this purpose: *Phipps v. Pierce*, 94 N. C. 514.

ADMISSIONS AND DECLARATIONS OF AGENTS.—The act of an agent performed within the scope of his employment is the act of his principal. And "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestæ*": *Story on Agency*, secs. 134-137. The admission or declaration of an agent is not always binding upon the principal. The admission of a party is always evidence against him. "But the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to the transaction then depending *et dum ferret opus*. It is because it is a verbal act, and part of the *res gestæ* that it is admissible at all; and therefore it is not necessary to call the agent himself to prove it": 1 Greenl. Ev., sec. 113; *Doe v. Hawkins*, 2 Q. B. 212; *Saunier v. Wode*, 18 N. J. L. 299. So when the act of the agent is admissible, what he said and did as the *res gestæ* of that act is admissible also: and his declarations and admissions are not admissible, unless they are the *res gestæ* of an authorized act: *Garth v. Howard*, 8 Bing. 451; *Fairlie v. Hastings*, 10 Ves. 123, 127; *Langhorn v. Allnutt*, 4 Taunt. 519; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 336, 337; *Innis v. Steamer Senator*, 1 Cal. 459; S. C., 54 Am. Dec. 305; *Citizens' Gas-light and Heating Co. v. Granger*, 19 Ill. App. 201; *Rose v. Chapman*, 44 Mich. 312; *Hydom v. Cushman*, 16 Hun, 107; *Bank of Monroe v. Field*, 2 Hill, 445; *Cooley v. Norton*, 4 Cush. 93; *Woods v. Banks*, 14 N. H. 101; *Hannay v. Stewart*, 6 Watts, 487.

489; *Stockton v. Demuth*, 7 Id. 39; *Stephoe v. Pollard*, 30 Gratt. 689, 704. And after his authority has ceased with respect to the particular matter in question, his declarations in that regard are no longer admissible, for they become mere hearsay: *Reynolds v. Rowley*, 3 Rob. (La.) 201; *Stiles v. Western R. R. Co.*, 8 Met. 44; *Stiles v. Danville*, 42 Vt. 282; *Burnam v. Ellis*, 39 Me. 319. And according to the weight of authority, his declarations as to a past transaction are not admissible, although his authority to perform similar acts still continues; for such declarations are not *res gestæ*, — are not a part of the transaction in question: See the remarks of Tindal, C. J., in *Garth v. Howard*, 8 Bing. 451; *Mortimer v. McCallan*, 6 Mees. & W. 58, 69, 73; *Plumer v. Briscoe*, 11 Q. B. 46; *Brannen v. United States*, 20 Ct. of Cl. 219; *City Bank v. Bateman*, 7 Har. & J. 104; *Baring v. Clark*, 19 Pick. 220; *Parker v. Green*, 8 Met. 142, 143; *Dorn v. Southworth Mfg. Co.*, 11 Cush. 205; *Haven v. Brown*, 7 Greenl. 421, 424; *Thalheimer v. Brinckerhoff*, 4 Wend. 394; *Fogg v. Child*, 13 Barb. 246; *Hydom v. Cushman*, 16 Hun, 107; *Stewartson v. Watts*, 8 Watts, 392; *Griffin v. Montgomery R. R. Co.*, 26 Ga. 111. They must be made at the very time he is doing an act he is authorized to do, and must be concerning the act he is then doing: *Baldwin v. Doubleday*, 8 Atl. Rep. 576 (Vt.); *Hydom v. Cushman*, 16 Hun, 107. Though where some time after the insurer's agent had agreed to renew a policy, and had received the renewal premium, being asked by the assured for the certificate of renewal, he insisted that he had previously delivered it to the insured; this was an admission constituting part of the *res gestæ*, and binding upon the insurer; *Scott v. Home Ins. Co.*, 63 Wis. 238. But this was plainly a declaration made in connection with the transaction of the proposed renewal made during its pendency, and not after its conclusion: See also *Insurance Co. v. Woodruff*, 26 N. J. L. 541. The admissions of a baggage-master, in answer to inquiries for lost baggage, are admissible, being within the scope of his duty: *Morse v. Connecticut River R. R. Co.*, 6 Gray, 450; *Illinois Cent. R. R. Co. v. Troustine*, 2 S. Rep. 255 (Miss.). The admission of the master of a ship libeled for a collision are admissible: *The Manchester*, 1 W. Rob. 62. And in an action for the price of land, the defense of fraudulent representations on the part of the vendor may be maintained by proof of such representations made by the vendor's agent who negotiated the sale: *Hammatt v. Emerson*, 14 Shep. 308. But the declarations of the bailee of a bond placed in his hands by the defendant were not competent to prove that the defendant executed the bond, or to establish the existence of any other contracts between the parties. Here the *res gestæ* comprised the bailment and its nature, and beyond these matters the declarations of the bailee did not affect the bailor: *Fairlie v. Hastings*, 10 Ves. 123. So where a wife's admissions are not confined to acts of agency, they cannot be used against her husband in an action on contract against him, unless where they are *res gestæ*, and admissible as acts instead of relations of facts: *Rose v. Chapman*, 44 Mich. 312. As to matters not of the *res gestæ*, the agent must be called to testify as other witnesses are: 1 Greenl. Ev., sec. 114; *Maesters v. Abraham*, 1 Esp. 375; *Johnson v. Ward*, 6 Id. 47.

Railroad Employees. — Declarations of conductors, engineers, or brakemen of a railroad train, made even shortly after the happening of an accident, as to the cause and manner of its happening, are generally held to be inadmissible, in actions against the railroad company for damages, for the reason that they are not of the *res gestæ*, and therefore not binding on the company: *Griffin v. Montgomery R. R. Co.*, 26 Ga. 111; *Robinson v. Fitchburg R. R. Co.*, 7 Gray, 92; *Alabama etc. R. R. Co. v. Hawk*, 72 Ala. 112; S. C., 47 Am. Rep.

403. Thus a remark by the engineer of the train which ran over plaintiff, made in plaintiff's presence two or three hours after the accident, to the effect that he did not see him until struck by the locomotive, is not admissible: *Travis v. Louisville and Nashville R. R. Co.*, 9 Lea, 231. Admissions of a conductor, made days after a passenger fell from his train, that he kicked him off, are not part of the *res gestæ*: *Moore v. Chicago etc. R. R. Co.*, 59 Miss. 243. Where plaintiff was injured by the sudden starting of a horse-car from which she was alighting, a remark made to her by the conductor immediately after she fell, to the effect that he was very sorry, and that it was his fault, is inadmissible as a part of the *res gestæ*: *Williamson v. Cambridge R. Co.*, 10 N. E. Rep. 790 (Mass.). In an action against a railroad company for killing a man, a remark by one of the train-men to another immediately after the accident, "If you had stopped the train when I told you, you would not have killed him," was not admissible: *Adams v. Hannibal R. R. Co.*, 74 Mo. 553; S. C., 41 Am. Rep. 333. In an action against a railroad company for injuries resulting from the negligence of a brakeman in leaving open a switch, the admissions of the brakeman that he caused the accident, not made in the execution of his duty or at the time, were inadmissible against the company: *Patterson v. St. Louis, Wabash, etc. R'y Co.*, 54 Mich. 91. And in an action for damages resulting from the blowing of a whistle which frightened the plaintiff's horse, what he said soon afterwards as to the engineer's shaking his fist at him, and what the engineer said on arriving at the next station, indicating malice, are not of the *res gestæ*: *Newson v. Georgia R. R. Co.*, 66 Ga. 57. And so in an action to recover damages from a railroad company for killing plaintiff's stock, evidence of the statements of a section foreman as to the fact of the killing, made after the event, are inadmissible as a part of the *res gestæ*: *Smith v. St. Louis, I. M. & S. R'y Co.*, 3 S. W. Rep. 836 (Mo.).

To justify the admission of the declarations of employees of the railroad company, they should be shown to be part of the *res gestæ* of the accident, and to have been made by the employees in the course of their duties as agents: *Petrie v. Columbia & G. R. R. Co.*, 2 S. E. Rep. 837 (S. C.). And if this is established, then they are admissible. Thus in an action for lost baggage against a carrier, evidence of the statements made by defendant's baggage-master to plaintiff's salesman, as to how the fire occurred which destroyed the baggage, were admissible as part of the *res gestæ*: *Illinois Central R. R. Co. v. Troustine*, 2 S. Rep. 255 (Miss.). And language used by a brakeman when ejecting plaintiff from the train is admissible in an action against the company, not to show his authority, but his intention: *Marion v. Chicago, Rock Island, etc. R'y Co.*, 64 Iowa, 568. After an accident to plaintiff, he was taken on the train that injured him and carried three miles to a station. There the engineer made a report of the accident to his superior officer, and stated the circumstances of its occurrence, which report was required by the rules of the defendant company. And it was held that the statements then made by the engineer were competent evidence as to the circumstances of the accident: *Keyser v. Chicago & G. T. R. Co.*, 33 N. W. Rep. 867 (Mich.). These declarations were plainly of the *res gestæ*, and within the scope of the employee's duty. And the same is true of the admissions of the general agent or president of the company as to the cause and circumstances of an accident: *Charleston R. R. Co. v. Blake*, 12 Rich. 634.

In some cases, however, the rule is relaxed somewhat, and not applied stringently. Thus, declarations made a few seconds after a railroad acci-

dent, by the engineer of one of the trains, as to facts connected with the accident, were held admissible against his company as part of the *res gestæ*: *McLeod v. Ginther*, 80 Ky. 399. And so statements as to how an accident occurred, made by an engineer of a train that had just thrown plaintiff from the railroad track, and after running a short distance had backed to the scene of the accident, and made immediately after the train stopped at the place of the accident, were held to be a part of the *res gestæ*, and properly admitted to show how the accident occurred: *Keyser v. Chicago & G. T. R. Co.*, 33 N. W. Rep. 867 (Mich.). And where a railroad train ran upon and injured horses on the track, what was said by the engineer to the conductor of the train immediately after the accident, and after the train had stopped, and while they were examining to ascertain what mischief had been done, indicating when he first saw the horses on the track, there not appearing anything but the occurrence to cause or produce the statement, was permitted to be proved as part of the *res gestæ*: *O'Connor v. Chicago etc. R. R. Co.*, 27 Minn. 166; S. C., 33 Am. Rep. 829, and note. So in an action against a railway company to recover for damage from a fire that had spread from a burning of grass and weeds, declarations by the defendants' servants as to the setting of the fire were held to be admissible against defendant as part of the *res gestæ*: *Ohio etc. R'y Co. v. Porter*, 92 Ill. 437. And in *Wengler v. Missouri Pacific R. R. Co.*, 16 Mo. App. 493, the court went even further, and in an action against a railroad company for an injury caused by negligence, admitted testimony that a few days after the injury the conductor who had charge of the train said the bell was not rung and the train was running at an excessive rate of speed.

DECLARATIONS OF COMPETENT WITNESS are not admissible except when they are parts of the *res gestæ*. Otherwise the witness must ordinarily be produced, his declarations being merely hearsay: *Gilbert v. Gilbert*, 22 Ala. 529; S. C., 58 Am. Dec. 268; *Williams v. Kelsey*, 6 Ga. 365; *Brown v. Mooers*, 6 Gray, 451; *Howell v. Howell*, 37 Mo. 124; *Luby v. Railroad Co.*, 17 N. Y. 131; *Anderson v. Railroad Co.*, 54 Id. 334; *Allen v. Denstone*, 8 Car. & P. 760; *Great Western R. R. v. Willis*, 18 Com. B., N. S., 748. Therefore in an action arising out of a collision of carriages on a highway, the declaration of the defendant's servant, that the plaintiff was not to blame, though made immediately after the collision, were excluded: *Lane v. Bryant*, 9 Gray, 245; and see *Robinson v. Railroad Co.*, 7 Id. 92.

WHAT DECLARATIONS OF PARTY ARE ADMISSIBLE IN HIS OWN FAVOR. — This topic will be found fully treated in the note to *Baker v. Kelly*, 93 Am. Dec. 274; the general rule being, as there stated, that such declarations are admissible when spontaneous, contemporaneous, and part of the *res gestæ*: *Phillips v. State*, 19 Tex. App. 153; *Williams v. English*, 64 Ga. 546; *Nicholson v. Tarpey*, 12 Pac. Rep. 778 (Cal.); but see *State v. Anderson*, 10 Or. 448. They must be contemporaneous with, or at least so connected with the main fact in issue as to constitute a part of the transaction, and thus derive credit from the main fact or act itself, to explain or characterize which they are offered in evidence: *Conlan v. Grace*, 30 N. W. Rep. 880 (Minn.).

ENTRIES AND BOOKS OF ACCOUNT are also admissible as parts of the *res gestæ*; but this subject receives an extended treatment in the note to *Union Bank v. Knapp*, 15 Am. Dec. 191-198. An entry made by a banker or merchant in his account-book, at the time of the transaction, and in the presence of all the parties, is part of the *res gestæ*; and the book is admissible in evidence to show it, and to corroborate the memory of witnesses. So held, in an action on a check, where the issue was whether the money called for by

the check had been paid in settlement or not: *Revere v. Powell*, 61 Ga. 30. And so, on the question of the identity of certain goods shipped from London to New York with those levied on, it was held that the custom-house entry and invoice, though defective and irregular in respect of the requirements of the customs laws, were nevertheless admissible in evidence as part of the *res gestæ*: *Brooks v. Connor*, 10 Daly, 183.

ADMISSION IN EVIDENCE OF PART OF CONVERSATION OR TRANSACTION, AND ITS EFFECT TO AUTHORIZE ADMISSION OF REMAINDER THEREOF.—This topic is treated in the note to *Rouse v. White*, 82 Am. Dec. 342-345.

DECLARATIONS OF VENDOR, WHEN EVIDENCE AGAINST HIS VENDOR TO SHOW FRAUD.—This subject is treated in the note to *Horton v. Smith*, 42 Am. Dec. 631-633. In an action for specific performance of a contract to convey, declarations and letters by the vendor, subsequent to the vendee's taking possession, are not admissible as part of the *res gestæ*: *Osborne v. Osborne*, 33 Kan. 257. So in an action of detinue by an original vendor against a sub-purchaser from his vendee, the conduct, declarations, and actions of the original vendee, subsequent to the sale, are not admissible in evidence against the sub-purchaser, not being a part of the *res gestæ* of such transaction: *New York etc. Cigar Co. v. Bernheim*, 15 S. Rep. 470 (Ala.).

ADMISSIBILITY IN EVIDENCE OF DYING DECLARATIONS: *Daily v. Railroad Co.*, 87 Am. Dec. 176, and cases collected in note 177; *Commonwealth v. Cooper*, 81 Id. 762, and note 764; restricted to act of killing and to *res gestæ*: *State v. Shelton*, 64 Id. 587.

THE PRINCIPAL CASE IS CITED TO THE POINT THAT DECLARATIONS MADE BY THE party injured, as to the cause and manner of the injury which terminated in his death, are admissible in evidence against the person charged with the homicide, although made after all action on the part of the wrong-doer, actual or constructive, had ceased, in *People v. Ah Lee*, 60 Cal. 88; and is cited on the point as to what declarations constitute part of the *res gestæ*, at time of purchase of land, in *Moore v. Jones*, 63 Id. 16.

FALKINBURG v. LUCY.

[85 CALIFORNIA, 52.]

UNDER CALIFORNIA PRACTICE, PLAINTIFF IS ENTITLED TO INJUNCTION at the time of issuing the summons upon the complaint alone, if it makes a proper case, and is duly verified as prescribed, but if he asks for an injunction thereafter, he must do so upon affidavit.

DISSOLUTION OF INJUNCTION.—If an injunction has been granted without notice to the defendant, he may move to dissolve: 1. Upon the papers, whatever they may have been, upon which it was granted; or 2. Upon such papers, and affidavits on the part of the defendant, with or without the answer. If the defendant pursues the first course, the plaintiff can make no further showing, but must stand upon his complaint, or his complaint and affidavits, as the case may be; but if the defendant pursues the second course, the plaintiff may meet it with a further showing on his part.

MOTION TO DISSOLVE INJUNCTION ON VERIFIED ANSWER.—If the defendant moves to dissolve an injunction upon what he has prepared as his

verified answer, he makes it an affidavit in the sense of the statute for all the purposes of his motion, and he cannot deprive the plaintiff of his right to reply by way of affidavits on his part.

MANUFACTURER OF GOODS, OR VENDOR FOR WHOM THEY HAVE BEEN MANUFACTURED, HAS RIGHT, at common law, to designate them by some peculiar name, symbol, figure, letter, form, or device, whereby they may be known in the market as his own, and be distinguished from other like goods manufactured or sold by other persons. And the courts will protect him in the exclusive use of such mark, when original with him, so far as it serves to indicate the origin and ownership of the goods to which it is attached, to the exclusion of such symbols, figures, and combination of words which may be interblended with it, and merely indicating the name, kind, or quality.

CALIFORNIA TRADE-MARKS STATUTE—CONSTRUCTION.—By the term “peculiar name, letters, marks, devices, figures, or other trade-mark or name,” as used in the statute, is meant, not the proper and established names by which the “articles” are known in the market, nor something indicating their actual kind, character, or quality, but something new, of the manufacturer’s own invention, which is peculiar to him, and not common to him and others, and which is intrinsically foreign to the “articles” themselves, and only serving to designate them because it has been fancifully put to that use, in disregard of all natural relations.

SAME—SCOPE OF STATUTE.—The statute does not vest in the manufacturer or vendor, as the case may be, any exclusive property in the thing manufactured or sold, nor in the name or the words which most aptly describe it, and if it did, it would be so far void for want of power in the legislature to enact it.

SAME—VALIDITY OF STATUTE.—If the statute goes beyond the common law, and embraces within its protection matter which relates to kind, character, or quality of the thing manufactured or sold, it is not perceived why it does not trench upon the law of copy and patent rights, and is therefore void.

SAME—IN WHAT RESPECT STATUTE INOPERATIVE.—It is suggested that the matter used in the statute relative to designation of kind and quality was inadvertently incorporated under a mistaken notion of the functions of a trade-mark, and in that respect the statute can have no intelligible operation.

ENTIRE LABEL WILL NOT BE PROTECTED AS TRADE-MARK, where it contains the name of the article manufactured, a statement of the mode of its use, and a laudation of its qualities; only so much of the label will be protected as indicates that the complainants are the manufacturers or vendors of such article.

ACTION to enjoin the use of the plaintiffs’ trade-mark. The facts are stated in the opinion.

Campbell, Fox, and Campbell, for the appellants.

T. B. Reardon, for the respondents.

By Court, SANDERSON, J. This is an action to recover damages for an alleged invasion of the plaintiffs’ right of property in a certain trade-mark, and to restrain the defendants by in-

junction from further use or imitation. Upon the filing of the complaint an injunction was issued and served, and thereupon the defendants filed their answer, and moved to dissolve the injunction upon the complaint and the answer, with the exhibits thereto respectively attached.

At the hearing the plaintiffs offered to read an affidavit made by one of them in contradiction of certain matters contained in the answer. To this the defendants objected, upon the ground that the plaintiffs could not use affidavits in opposition to the motion, unless the defendants first used them in support of the motion, which, as was claimed, had not been done. This objection was overruled, the affidavit heard, and the motion to dissolve finally denied. The appeal is from the order refusing to dissolve the injunction. The grounds of alleged error are two: 1. Admitting and considering the plaintiffs' affidavit, as above stated; 2. Refusing to dissolve the injunction.

1. In view of the conclusion which we have reached upon the second point, we might pass the first without special notice; but it is asserted on the part of counsel that upon the first point no uniform rule prevails in the lower courts, and a construction of the statute by this court is asked, to the end that a uniform practice may be established.

By section 113 of the practice act, it is provided that an injunction may be granted, at the time of issuing the summons, upon the complaint; and at any time afterwards, before judgment, upon affidavits.

By section 118 it is provided that where an injunction has been granted without notice, the defendant may move to dissolve upon the complaint and affidavits upon which the injunction was issued, or upon the affidavit of the defendant, with or without the answer; and if upon affidavits, the plaintiff may oppose the same by affidavits or other evidence, but not otherwise.

In the code of New York this subject is regulated by section 120, which fills the place occupied by section 113 of our practice act, and sections 125 and 126, which together cover the ground embraced by section 118 of our statute. Sections 125 and 126 of the New York code are in all respects the same as section 118 of our practice act; but section 120 of the former differs from section 113 of the latter; the latter allows an injunction to be granted upon the complaint as such; while the former does not, but requires an affidavit where the injunction

is issued at the time of commencing the action, as well as where issued afterward. With this exception, there is no difference between the statutes.

Upon the question whether the plaintiff may use affidavits or other evidence in addition to those upon which the injunction has been granted in opposition to a motion to dissolve or modify, where the defendant rests his motion upon a verified answer, unaccompanied by any affidavits or other evidence on his part, there has been much conflict of opinion in the lower courts of New York. So far as we are advised, the question has never been settled by the court of appeals. The negative is supported by the following cases: *Merrimack Mfg. Co. v. Garner*, 2 Abb. Pr. 318; S. C., 4 E. D. Smith, 387; *Blatchford v. New York and New Haven R. R. Co.*, 7 Abb. Pr. 322; *Servoss v. Stannard*, 2 Code R. 56; *Hartwell v. Kingsley*, 2 Id. 101; S. C., 2 Sand. 674; *Benson v. Fash*, 1 Code R. 50; *Roome v. Webb*, 1 Id. 114; 3 How. 327; *Millikin v. Cary*, 3 Code R. 250; S. C., 5 How. Pr. 272. And the affirmative by the following: *Krom v. Hogan*, 2 Code R. 144; S. C., 4 How. Pr. 225; *Schoonmaker v. Reformed Dutch Church*, 5 How. Pr. 267; *Hascall v. Madison University*, 1 Code R., N. S., 170; *Jaques v. Areson*, 4 Abb. Pr. 282; *Hollins v. Mallard*, 10 How. Pr. 540; *Fowler v. Burns*, 7 Bosw. 637.

In the case last cited, the question was maturely considered, and the conclusion reached, that if the defendant moves upon a verified answer, the plaintiff may oppose the motion with new and additional affidavits. This diversity of opinion was due, doubtless, as suggested in *Fowler v. Burns*, *supra*, to the mistaken notion on the part of some members of the bench and bar that it was not intended by the code to change the practice in this respect which had previously existed in that state. It was settled prior to the code, under the chancery practice of that state, that where the defendant moved upon bill and answer only, the plaintiff could not read affidavits: *Hoffman v. Livingston*, 1 Johns. Ch. 211; *Roberts v. Anderson*, 2 Id. 202; *Couch v. Ulster & O. T. Co.*, 4 Id. 26; *Noble v. Wilson*, 1 Paige, 164; *Livingston v. Livingston*, 4 Id. 111. Familiarity with that practice, doubtless, led to its continuance in many cases under the code.

We consider the rule stated in *Fowler v. Burns*, *supra*, to be a correct exposition of the statute. The law of the question we hold to be as follows: The plaintiff is entitled to an injunction at the time of issuing the summons upon the complaint

alone, if it makes a proper case, and is verified in the manner stated in section 113; but if he asks for an injunction at any time thereafter, he must do so upon affidavits. If the injunction has been granted without notice to the defendant, he may move to dissolve, — 1. Upon the complaint or affidavits, or in other words, the papers, whatever they may have been, upon which the injunction was granted; or 2. Upon the papers upon which it was granted, and affidavits on the part of defendant, with or without the answer. If the defendant rests his motion upon the papers upon which the injunction was granted, the plaintiff can make no further showing, but must stand upon his complaint, or his complaint and affidavits, as the case may be. If, however, the defendant makes a counter-showing by affidavit, with or without the answers, the plaintiff may meet it with a further showing on his part. It will be observed that the defendant is not allowed to move upon the answer with or without affidavits, but upon affidavits with or without the answer; hence, if he moves upon what he has prepared as his verified answer, he makes it an affidavit in the sense of the statute for all the purposes of his motion, and he cannot deprive the plaintiff of his right to reply, by calling it an answer instead of an affidavit.

Under the old chancery practice, as already suggested, the defendant could move upon bill and answer, and if he did so, the plaintiff could make no further showing. This rule made it necessary for the plaintiff to anticipate the defendant's case, and annex to his bill affidavits, more or less numerous, according to circumstances, designed to meet it. This was imposing upon the plaintiff labor which might prove useless. It was also contrary to the more orderly and logical mode of getting at the case. We therefore consider that it was the intention of the framers of the New York code to relieve the plaintiff from the necessity of anticipating the defendant's case, and to adopt the more orderly and logical practice of requiring the plaintiff, in the first instance, to make a *prima facie* case only, and giving him an opportunity to meet the defendant's case after it had been presented.

2. The plaintiffs' label commences with a highly colored picture representing a washing-room, with tubs, baskets, clothes-lines, etc. There are two tubs painted yellow, at each of which stands a female of remarkably muscular development, with arms uncovered, and clad in a red dress, which is tucked up at the sides, exposing to view a red petticoat with three black

stripes running around it near the lower extremity. Each is apparently actively engaged in washing, and clouds of steam are gracefully rolling up from the tubs and dispersing along the ceiling. In the background is extended across the room a clothes-line, upon which are suspended stockings and other undergarments, which have evidently just been put to use in testing the cleansing properties of the plaintiffs' washing powder. To the left of the washerwomen stands a lady in a yellow bonnet, red dress, green congress gaiters, and hoops of ample circumference; upon her left arm is suspended a yellow basket; and in her left hand, which is encased in a red glove, is held a red parasol; while the right hand, which is encased in a green glove, is gracefully extended towards the nearest washerwoman in an attitude of earnest entreaty. In the immediate foreground is a yellow and green clothes-basket, full of dirty linen, and a yellow and green soap packing-box, upon which are printed in small capitals the words: "Standard Co.'s Soap." Each wash-tub is supported by a four-legged stool,—some of the legs being yellow, some red, some green, and some all three. The floor of the room, as to color, is in part of a yellowish green, and in part of a greenish red, while the walls are of a grayish blue. This is but an imperfect description of the picture with which the plaintiffs' label is adorned. The design is good, for it is eminently suggestive of the character of the plaintiffs' goods.

Over the top of this picture are printed, in large capitals, the words "Standard Soap Company"; at the right the word "Concentrated," at the left "Erasive," and at the bottom, in still larger type, the words "Washing Powder,"—completing the following legend: "Standard Soap Company Concentrated Erasive Washing Powder."

Next follow laudatory remarks and directions for use; also directions for making soft soap by dissolving the washing powder in water; also a statement as to the different packages in which the powder is put up, concluding with a designation of the place where the powder is manufactured, in the following form and words:—

MANUFACTURED AT
No. 207 COMMERCIAL STREET,
Bet. Front and Davis—Concrete Building,
SAN FRANCISCO.

The label is upon buff paper, and all the printed matter is in black ink.

The defendants have two labels, one of which commences with the figure of a parallelogram, made by two red lines, the inner one light and the outer one heavy. Inside are printed the following words, in large type:—

“Lucy & Hymes’ Excelsior Washing Powder,” followed by the words “Lucy & Hymes,” in script, with the words “None genuine without our signature,” added in type,—all in blue ink except the words “washing powder,” which are in red ink. Next follows a copy of the plaintiffs’ label, down to the place where the place of manufacture is given, which is as follows:—

MANUFACTURED BY
LUCY & HYMES.

Factory—Beale Street, between Mission and Howard, San Francisco.
OFFICE: NO. 319 CALIFORNIA STREET.

All below the parallelogram is printed in blue ink, whereas the plaintiffs’ label, as already stated, is printed in black ink. At the foot of the plaintiffs’ label are the words “Trade-mark secured,” whereas no such words are upon the defendants’ label.

The other label of the defendants is substantially the same, except that, instead of the matter in type and script, the parallelogram incloses a picture representing an enthusiastic young man, with head uncovered, and hair blown out behind by what one, judging of causes by their effects, might suppose to be a strong breeze. He is dressed in a blouse, tights, and top-boots; in his right hand he bears a banner, upon whose folds, as they flutter in the breeze, appears, in large type, the word “Excelsior.” His left arm is extended upward and pointing toward the summit of a high and precipitous mountain which towers in front of him, and which, as his bearing indicates, he proposes to climb. The principal colors used in this cut are blue and white. On the right of the picture is printed “Lucy & Hymes,” on the left, “Excelsior,” and underneath, “Washing Powder,”—making the legend, “Lucy & Hymes’ Excelsior Washing Powder,” all in red ink. The signature of the defendants, in script, and the words, “None genuine without our signature,” inclosed in the parallelogram in the other label, appear in this at the foot of the directions for the use of the compound.

From the foregoing, it will be seen that the labels are the same in three respects only,—the words “Washing Powder,” the directions as to use and mode of making soft soap, and

the color of the paper upon which they are printed. In all other respects they are unlike.

By the common law, the manufacturer of goods, or the vendor of goods for whom they have been manufactured, has a right to designate them by some peculiar name, symbol, figure, letter, form, or device, whereby they may be known in the market as his, and be distinguished from other like goods manufactured or sold by other persons. The owner of such peculiar marks, provided they are original with him, will be protected in their exclusive use by the courts; but only so far as such marks serve to designate the true origin or ownership of the goods to which they are attached. He will not be protected in the use of figures, or symbols, or combinations of words, which serve merely to indicate the name, kind, or quality of the goods to which they are attached, notwithstanding they may be interblended with others which indicate origin and ownership: *Fetridge v. Wells*, 4 Abb. Pr. 144; *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 599; *Stokes v. Landraff*, 17 Barb. 608. This rule obviously follows from the admitted policy upon which the law in relation to trade-marks is founded, which is twofold,—to protect purchasers from the fraud and imposition of persons who may seek, by false representations, to dispose of inferior goods of their own manufacture as those of a superior quality and established reputation manufactured or sold by other parties, and to secure to every manufacturer the merited fruits of his own industry and inventive skill, without, however, creating a monopoly or interfering with the right of every one to manufacture or sell the same kind of goods.

The plaintiffs claim their entire label as their trade-mark, and ask to be protected in the use of it as a whole; but it is clear that the common law gives no countenance to such a claim. Only so much of their label as serves to indicate that they are the manufacturers or vendors of the washing powder can be considered as constituting the legitimate characteristics of a common-law trade-mark. Hence, for the purpose of determining whether the conduct of the defendants has been actionable at common law, all that portion of the plaintiffs' label which relates to the name of the compound in question, its mode of use, laudation, and soft soap, must be discarded, as constituting, in a common-law sense, no part of a trade-mark. Indeed, it may be doubted whether the picture can be considered as matter of trade-mark. In *Partridge v. Menck*, 2

Sand. 622, both labels were embellished with a wood-cut of a bee-hive, yet the preliminary injunction was dissolved. The injunction was also dissolved in the case of *Merrimack Mfg. Co. v. Garner*, 4 E. D. Smith, 391, notwithstanding the words used were inclosed in a floral wreath in both labels. We shall, however, treat the picture of the wash-room and its occupants as a part of the plaintiffs' trade-mark.

It follows that the only parts of the plaintiffs' label which can, by the common law, be considered as constituting their trade-mark are the picture of the wash-room with its implements and occupants, the legend by which it is surrounded, with the exception of the words "washing powder," and the words designating the place of manufacture.

Applying the same erasing process to the defendants' label, and we have left only the words "Lucy & Hymes' Excelsior Washing Powder" in type, followed by a repetition of their names in script, and terminating with the words "None genuine without our signature"; all inclosed in a parallelogram made by two red lines, and the words designating the factory and address of defendants in the one, and the same in the other, with the picture already noted added.

Now, compare the two, and it is manifest that the charge of piracy or colorable imitation, tested by the common law, is without the slightest foundation. The plaintiffs have a highly colored and suggestive pictorial embellishment; the defendants have none in one, and a very different one in the other label. The plaintiffs call their compound "The Standard Soap Company's Concentrated Erasive Washing Powder"; the defendants call theirs "Lucy & Hymes' Excelsior Washing Powder."

The plaintiffs state that their compound is

MANUFACTURED AT
No. 207 COMMERCIAL STREET,
Bet. Front and Davis — Concrete Building,
SAN FRANCISCO.

The defendants, that theirs is

MANUFACTURED BY
LUCY & HYMES.
Factory — Beale Street, between Mission and Howard, San Francisco.
OFFICE: No. 319 CALIFORNIA STREET.

There is not a mark, device, symbol, or word denoting origin or ownership common to both. No one could mistake

the modest parallelogram of the defendants for the highly colored pictorial wash-house of the plaintiffs. No one could mistake the defendants' young man in a blouse and tights, climbing a mountain with a banner in his hand, for the plaintiffs' washer-women in red petticoats, with their arms in a wash-tub and their heads enveloped in clouds of steam. No one could mistake the defendants' legend—"Lucy & Hymes' Excelsior Washing Powder"—for the plaintiffs'—"Standard Soap Company's Concentrated Erasive Washing Powder,"—or at least, only such persons as no amount of legislative care could protect from blunders and mistakes. The only matter common to both is the name of the article,—"Washing Powder,"—in which, as already stated, the plaintiffs can acquire no exclusive property, because it is the name by which compounds of like kind are known in the market, and which every person has an equal right to use. No right of the plaintiffs which has its foundation in the common law has, therefore, in our judgment, been violated or intruded upon by the defendants.

The plaintiffs, however, ground their cause of action, in part, if not mainly, upon the statute of this state in relation to trade-marks, of which they have secured the benefit; and claim that, by virtue of the statute, they have rightfully incorporated in their trade-mark, as a part of it, matter which denotes the peculiar kind, character, and quality of the compound to which it is attached, and may therefore claim for it the same measure of protection which the common law accords to matter which denotes origin and ownership. The first section of the statute reads as follows:—

"When a person . . . uses any peculiar name, letters, marks, devices, figures, or other trade-mark or name, cut, stamped, cast, or engraved upon or in any manner attached to or connected with any article, or with the covering or wrapping thereof, manufactured or sold by him, to designate it as an article of a peculiar kind, character, or quality, or as an article manufactured or sold by him, . . . it shall be unlawful for any other person, without his consent, to use said trade-mark or name, or any similar trade-mark or name, for the purpose of representing any article to have been manufactured or sold by the person rightfully using such trade-mark or name, or to be of the same kind, character, or quality as that manufactured or sold by the person rightfully using such trade-mark or name."

The second section prescribes how the benefits of the statute may be secured. Subsequent sections prescribe remedies and penalties for a violation of the statute, among which are damages and injunctions.

It is claimed, on the part of the plaintiffs, that the matter already noted as common to the labels of both parties indicates the "kind, character, and quality" of their compound in the sense of the statute, and is therefore protected by it.

This common matter reads as follows:—

"SAVES LABOR AND TIME.

"DIRECTIONS FOR WASHING.—For washing of forty or fifty pieces:—

"1. Take two pails of water, and put therein one fourth of this package, or a quarter of a pound of powder.

"2. Bring the water to a boiling heat.

"3. Pour this boiling water or solution on the clothes, and let them soak for half an hour or more, and while they are soaking, stir them briskly with a staff or dasher three or four different times.

"4. Wring them out, rubbing the soiled spots slightly.

"5. Put them in the boiler, adding two or three teaspoonfuls of the powder.

"After boiling three minutes, remove them, rinse them well in two waters, bluing the second water.

"This powder, used according to the above instructions, saves one half the labor, and the clothes will come out beautifully clean and white.

"Warranted not to rot or injure the clothes.

"This washing powder also contains all the requisite properties to make a fine soft soap.

"Give it a trial, and judge for yourself."

"DIRECTIONS FOR MAKING SOFT SOAP.—Dissolve the contents of a one-pound package in four quarts of boiling water. When thoroughly dissolved, add sufficient water to make two gallons; or, should you desire to make the soap thinner, add water at pleasure.

"Put up in one-pound packages, twelve and twenty-four in a box; and in ten-pound boxes, in bulk.

"No person will be without this valuable compound after once having given it a trial.

"Adapted for hard and salt water. Superior for washing fine goods.

"Woolens without shrinking.

"No soap is required with these powders."

Then follows the place of manufacture, after which comes the following:—

"These powders may be used in the place of soap, wherever soap is required, and will be found more convenient and economical for washing wood-work, dish-washing, etc. A little experience in using it will enable a person to judge of the quantity required."

Does the foregoing, or any part thereof, constitute the "peculiar name," "peculiar letters," "peculiar marks," "peculiar device," or "peculiar figures," mentioned in the statute? What does the statute mean by a "peculiar name, letter, mark, device, and figure"? We do not understand it to mean the proper and established name by which the compound or goods are known in the market. It must be something new, not before in use,—something of the manufacturer's own invention, or first put to use by him,—something peculiar to him, and not common to him and others,—not something indicating the actual kind, character, or quality of the compound; as, for instance, the ingredients of which, and the proportions in which, it is compounded, or the various uses to which it may be put, or the effects produced by it, but something extrinsic, not indicative,—something intrinsically foreign to the compound itself, and which serves to designate it only because it has been fancifully put to that use, in disregard of all natural relations; as, for example, "Merrimack Prints," "Clubhouse Gin," "Old London Gin," "Genuine Yankee Soap." Here the names do not denote the intrinsic qualities of the article; they are fanciful names by which in time the article may become known, and its "kind, character, and quality" be designated in the sense of the statute. Without any intrinsic relation to prints, the word "Merrimack" is made, by adoption and use, to designate prints of a certain kind, character, and quality, in the sense of the statute. So of "Clubhouse," "Old London," and "Genuine Yankee."

That the statute was not intended to protect parties in the use of proper and established names, or words, or combinations of words, intrinsically indicative of kind, character, and quality, must be conceded, when it is considered that everything must of necessity have a name and be possessed of certain qualities which certain words most aptly and properly describe; and that no person can have an exclusive property

in such name or words who has not also an exclusive property in the thing itself to which they are applied. The statute vests in the manufacturer or vendor, as the case may be, no exclusive property in the thing manufactured or sold; and if it did it would be so far void, for the want of power in the legislature. The plaintiffs having no patent for the manufacture and sale of the compound in question, the defendants have an equal right to manufacture and sell it, and by parity of reason and of necessity, an equal right to use its proper name and designate its qualities by any apt and proper words, notwithstanding the plaintiffs may be using the same. Such name and such words are not "peculiar," in the sense of the statute; on the contrary, they are the common property of all persons having occasion to use them.

If, as claimed by the plaintiffs, the statute means that a manufacturer or vendor of goods may describe their intrinsic qualities in words in common use, and upon filing his label in the office of the secretary of state secure an exclusive right to such or any similar description, the privilege attempted to be conferred by it is equivalent to a perpetual copyright, and the monopoly created is more durable than a patent right,—neither of which has the legislature the power to grant.

Under such a reading, the miller who manufactures different qualities of flour may describe them in his label as "middling," "fine," and "superfine," and thus prevent all other millers from using those words for a like purpose. The compounder of pills may apply to them the term "anti-bilious," and thereafter no other compounder of pills can use it. If, as claimed by the plaintiffs, mere directions for use indicate quality, and may therefore be the subject, under the statute, of exclusive property, no one but the plaintiffs can manufacture and sell the powder in question, because no one else can be allowed to give the same or similar instructions for its use; yet they have no patent. The vendor of medicines, who first files his label in the office of the secretary of state, with the usual instructions, "to be taken before eating," "to be taken before going to bed," "to be well shaken before taken," and so on to the end of the catalogue, may acquire an exclusive right to all the usual instructions which must necessarily accompany medicines, and thereby monopolize the trade.

What may be the precise meaning of the statute, it is not easy to say. If it goes beyond the common law, and embraces within its protection matter which relates to kind, character,

and quality, we are unable to perceive why it does not trench upon the law of copy and patent rights, and is not therefore void. It certainly does, if for that purpose it goes beyond fanciful and extrinsic terms, as above stated. Whether such terms, even so far as they indicate kind, character, or quality only, can be protected, is most doubtful.

We are inclined to think that the matter in relation to kind and quality was inadvertently incorporated in the statute, under a mistaken notion of the functions of a trade-mark, and that in that respect the statute can have no intelligible operation; but it is unnecessary, for the purposes of the present case, to finally determine its meaning; for, as we have already seen, there are no "peculiar names, marks," etc., denoting kind, character, or quality, in the plaintiffs' label, in the sense of the statute, whatever that sense may be, which the defendants have copied or imitated. The nearest approach to terms denoting kind and quality are the words "concentrated" and "erasive," neither of which is used by the defendants.

The injunction should have been dissolved, and the court below is directed to enter an order to that effect.

SAWYER, C. J., delivered a separate opinion, in which Mr. Justice Sprague concurred, dissenting from the prevailing opinion in so far as it holds that all that portion of the plaintiffs' label which relates to the name of the compound in question, its mode of use, laudation, etc., must be discarded, as constituting no part of a trade-mark; and holding that, whatever may have been the rule before, such portion of the label is within the scope of the protection afforded by the peculiar language of at least one provision of the statute. He observes that, "admitting the truth of the matters stated in the label, it is manifest that the two compounds are substantially the same, and in all respects serve the same purpose, and the exact copy of the entire body of the plaintiffs' label, showing the properties and mode of use, very strongly indicate a purpose to represent to the public that the two compounds were of the 'same kind, character, or quality.' As to this part of the label, I think it is within the statutory provision, and being so, section 11 authorizes the court to enjoin its use." He further observes that if the defendants "can copy or imitate the plaintiffs' arrangement of the language of the label, so as to make it palpable that their compound is the same thing, of the identical kind, character, or quality, then the provision of the statute under consideration is nugatory"; concluding with the opinion that the defendants "should be restrained from selling the compound while bearing the defendants' label in its present form, or any other label having upon it the plaintiffs' trade-mark, or any substantial portion of it, or any similar trade-mark, or similar portion thereof; and they should be restrained from using in any way the defendants' label in its present form, or any label having upon it the plaintiffs' trade-mark, or any portion of plaintiffs' trade-mark, or that portion of plaintiffs' label copied into defendants' label."

INJUNCTION, SERVICE OF: See *Haring v. Kaufman*, 78 Am. Dec. 102, and note 104.

INJUNCTION, PRACTICE ON DISSOLUTION OF: *Burnley v. Cook*, 65 Am. Dec. 79, and note 84; *Keighler v. Savage Mfg. Co.*, 71 Id. 600, and note 606; *Adams v. Hudson County Bank*, 64 Id. 469; *Trapnall v. McAfee*, 77 Id. 158, note; dissolution of by acts of plaintiff: *Howard v. Durand*, 91 Id. 767.

TRADE-MARK, WHAT IS: *Barrows v. Knight*, 78 Am. Dec. 452; *Partridge v. Mence*, 47 Id. 281, and extended note on the subject; *Woodward v. Lamar*, 82 Id. 751; is recognized by law as a species of property: *Bradley v. Norton*, 87 Id. 200; *Derringer v. Plate*, 87 Id. 170, and note 175.

TRADE-MARK, INJUNCTION AS REMEDY AGAINST INFRINGEMENT OF: *Bradley v. Norton*, 87 Am. Dec. 200, and note 204; when injunction will not lie to restrain use of: *Bowman v. Floyd*, 80 Id. 55, and note 59.

THE PRINCIPAL CASE IS CITED to the point that terms in common use to designate a trade or occupation, in connection with other words indicating that a particular class of merchandise of the same general description is specially dealt in, cannot be exclusively appropriated by any one as a trade-mark, in *Chojniski v. Cohen*, 39 Cal. 504; *Whittier v. Dietz*, 66 Id. 78; it is cited to the point that an entire label will not be protected at common law as a trade-mark, in *Burke v. Cassin*, 45 Id. 481; and is cited to the point that when the defendant moves, on the complaint and answer, to dissolve an injunction, the answer will be treated for all the purposes of the motion as an affidavit, and that the plaintiff on the hearing of the motion is entitled to reply to the answer by affidavits, in *Delger v. Johnson*, 44 Id. 184; *Huller v. Collins*, 63 Id. 237.

POORMAN v. MILLS.

[85 CALIFORNIA, 118.]

CERTIFICATE ISSUED BY BANK OR OTHER DEPOSITORY TO GENERAL DEPOSITOR, stating the fact of the deposit, and that it is payable to the depositor or order on demand, or on the return of the certificate properly indorsed, is in substance and legal effect a promissory note.

WHEN NOTE IS INDORSED IN BLANK, TITLE AND RIGHT OF ACTION PASS BY DELIVERY, and while the indorsement remains in blank the note is payable to the bearer. The holder may write over the indorsement, "Pay to the order of the [holder]," which has the effect, in the hands of a *bona fide* holder, of an indorsement in full.

CHANGE FROM BLANK TO FULL INDORSEMENT OF NOTE IS MERE MATTER OF FORM, and is not required to be made; and a note indorsed in blank is admissible in evidence in support of an allegation that the note was indorsed to the plaintiff by the payee.

PROOF OF INDORSEMENT OF PROMISSORY NOTE IS NECESSARY TO ENTITLE it to admission in evidence, unless waived when the indorsement is offered in evidence.

FACT OF INDORSEMENT ONLY NEED BE PLEADED TO SHOW TITLE IN PLAINTIFF, in an action on a promissory note by an indorsee, and an averment in the answer that the plaintiff is not the legal owner or holder of the note does not meet the allegation of indorsement, the fact upon which the plaintiff's title depends, and raises no issue.

INDORSEMENT OF PROMISSORY NOTE TO AGENT TRANSFERS TITLE THEREOF, as to all the parties except his principal, and the agent may maintain an action thereon in his own name.

INDORSEE OF PROMISSORY NOTE IS PRESUMED TO BE HOLDER FOR VALUE, and the burden is on the party denying to rebut this presumption.

IN ACTION ON PROMISSORY NOTE BY INDORSEE, NEITHER QUESTIONS, whether the plaintiff holds as an agent, or is a holder for value, can be considered on the motion for a nonsuit.

ACTION by the plaintiff as indorsee upon a certificate of deposit executed by the defendants, as follows:—

“\$750.

BANK OF D. O. MILLS & Co.,
SACRAMENTO, Oct. 18, 1866.

“George Rosenbaum has deposited in this bank fifteen hundred dollars, payable to himself or order, in United States gold coin, on return of this certificate properly indorsed.

“D. O. MILLS & Co.”

The answer denied that the plaintiff held the certificate for value, and for a further defense denied “that said Rosenbaum indorsed or delivered the said certificate of deposit to the plaintiff, that plaintiff is the legal owner or holder thereof, or that he is entitled to the amount of money due thereon, or the said sum of fifteen hundred dollars, or any part thereof.” The plaintiff introduced in evidence on the trial the certificate with its indorsements, and rested. A nonsuit was then granted on the defendants’ motion, based upon the ground that the plaintiff had not disclosed evidence sufficient to entitle him to maintain the action, and the plaintiff appealed.

Coffroth and Spaulding, for the appellant.

Robinson, Ramage, and Dunlap, for the respondents.

By Court, RHODES, J. A certificate of deposit issued by a bank or other depository to a depositor upon his paying to the former a sum of money on general, or, as it is sometimes called, irregular, deposit, stating that the depositor has deposited that sum payable to himself or order on demand, or on return of the certificate properly indorsed, is a promissory note: *Welton v. Adams*, 4 Cal. 37 [60 Am. Dec. 579]; *McMillan v. Richards*, 9 Id. 418 [70 Am. Dec. 655]; *Coye v. Palmer*, 16 Id. 159; *Brummagim v. Tallant*, 29 Id. 503 [89 Am. Dec. 61]; *Bank of Orleans v. Merrill*, 2 Hill (N. Y.), 295; *Leavitt v. Palmer*, 3 N. Y. 19 [51 Am. Dec. 333]; *Payne v. Gardiner*, 29 Id. 146.

It is elementary law that when a note is indorsed in blank

the title and right of action pass by delivery; that while the indorsement remains in blank the note is payable to the bearer; and that the holder may write over the indorsement "Pay to the order of [the bearer]"; and that has the effect, in the hands of a *bona fide* holder, of an indorsement in full: Chitty on Bills, 255. This change from a blank to an indorsement in full is not usually made, and as it is a mere matter of form it is not required to be done; and the note with the blank indorsement is admissible in evidence in support of the allegation that it was indorsed to the plaintiff by the payee.

The execution of the certificate of deposit was not denied, and when it, together with the indorsement, was offered in evidence, no objection was made that the indorsement was not proven. Had objection been made, proof of that fact would not have been required: *Pinkham v. McFarland*, 5 Cal. 137.

The averment of the answer, that the plaintiff is not the legal owner or holder of the certificate of deposit, raises no issue, for it is only an averment of a conclusion of law. It does not meet the allegation of indorsement, the fact upon which the plaintiff's title depends. And it may be added that the plaintiff's allegation that he is the owner and holder of the certificate, and entitled to receive the money due thereon, is surplusage, for it is but a legal conclusion arising from the alleged indorsement: *Wedderspoon v. Rodgers*, 32 Cal. 569.

An indorsement to an agent transfers the title of the instrument, as to all the parties thereto, except his principal: Story on Notes, sec. 126. It makes no difference to the maker whether he pays to the principal or his agent holding the instrument as an indorsee.

The indorsee is presumed to be a holder for value (Story on Promissory Notes, sec. 196), and the burden is on the defendant to rebut this presumption. Neither the question whether the plaintiff holds as an agent, nor the question whether he is a holder for value, can be considered on the motion for a nonsuit; for, in either case, the title is in the plaintiff, and he can maintain an action in his own name; but they may be important to the defendants when they come to make their defense, relying upon any equities or defenses existing between them and parties to the certificate prior to the plaintiff.

Judgment reversed, and cause remanded for a new trial.

675, note; *Lindsley v. McClelland*, 80 Id. 786; is the same in substance and effect as a promissory note: *Brummagin v. Tallant*, 89 Id. 61.

DELIVERY, WHAT INSTRUMENTS ARE TRANSFERABLE BY: *Ross v. Smith*, 70 Am. Dec. 327.

INDORSEMENT, NECESSITY, SUFFICIENCY, AND EFFECT OF: *Smalley v. Wight*, 69 Am. Dec. 112, and note 114; *Hall v. Monohan*, 71 Id. 404. One who puts his name upon the back of a note at the time it is made is held as a maker, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time: *Good v. Martin*, 91 Id. 706, and cases collected in note 710.

INDORSEMENT BY THIRD PARTY IN BLANK GIVES TO PAYEE OR INDORSEE IMPLIED POWER to write above it the most absolute terms of guaranty: *Killian v. Ashley*, 91 Am. Dec. 519, and see note 523.

ONE WHO TRANSFERS PROMISSORY NOTE BY DELIVERY, WITHOUT INDORSEMENT, thereby warrants that it is what it purports to be, and that it is neither forged nor fictitious: *Swansey v. Parker*, 88 Am. Dec. 549, and note 556.

INDORSEMENT IN BLANK, effect of, under Connecticut rule: *Riddle v. Stevens*, 87 Am. Dec. 181, and note 186.

INDORSEMENT OF NEGOTIABLE NOTE MAY BE MADE ON ANOTHER PAPER, attached to and made a part of the note, and called an *allonge*, whenever such indorsement is required either from necessity or convenience: *Crosby v. Roub*, 84 Am. Dec. 720.

THE PRINCIPAL CASE IS CITED to the point that an averment in a complaint on a promissory note "that the plaintiff is still the owner and holder of the note," etc., is surplusage in *Hook v. White*, 36 Cal. 302.

CORWIN v. WARD.

[85 CALIFORNIA, 195.]

PERSON MAY RECEIVE MONEY DUE ON JUDGMENT RENDERED IN FAVOR OF HIMSELF and several others, co-plaintiffs, but he cannot, without authority from his co-plaintiffs, set off a judgment due to him and them jointly against another judgment held by the defendant in such joint judgment against himself alone.

ACTION AUTHORIZING FIVE PER CENT DAMAGES TO BE TAXED AS COSTS against the losing party in litigated cases in San Francisco operates equally and uniformly upon all parties upon whom it operates at all, and is constitutional.

ACTION to recover the amount due on a judgment recovered by one Mann in the district court, Alameda County, in 1860, against the defendants, Ward and Vesey, and assigned to the plaintiff, Corwin. Ward relied upon the defense that in 1859, in the same court, one Estudillo and several co-plaintiffs, one of whom was Ward, recovered a judgment against said Mann, and that thereafter the said co-plaintiffs and the said Mann mutually agreed to set off one judgment against the other.

The judgment in this action was in favor of the plaintiff, against the defendant Ward, for the full amount claimed, with five per cent on the damages recovered, and costs. The defendant Vesey pleaded a discharge in insolvency, and had judgment for costs. Ward appealed. Other facts appear in the opinion.

McCullough and Boyd, for the appellant.

James McCabe, for the respondent.

By Court, SAWYER, C. J. Ward might receive the money due on the judgment in favor of himself and several other co-plaintiffs. But he could not, without authority from his co-plaintiffs, set off a judgment due to them jointly against another judgment held by the defendant in such joint judgment against himself alone. Receiving payment in money of the amount due on a judgment is a very different thing from an executory agreement to set off another judgment against it. One requires no special authority from the co-plaintiffs; the other does. In this case no authority from his co-plaintiffs is shown in Ward to set off the judgment in their favor jointly against the judgment against Ward alone. Besides, on the question of an agreement to set off one judgment against the other, the testimony was directly in conflict, and the court found the facts, and we are inclined to think correctly, in favor of the plaintiff.

We see no constitutional objection to the act which authorizes five per cent damages to be taxed as costs against the losing party in litigated cases in San Francisco: Stats. 1858, p. 332, sec. 7; Stats. 1866, p. 68, sec. 6. It operates equally and uniformly upon all parties in the same category,—upon all upon whom it acts at all,—that is to say, upon parties in the city and county of San Francisco, where the cause was litigated. It is constitutional according to the authorities cited by the appellant to sustain the opposite view: *Bourland v. Hildreth*, 26 Cal. 256; *French v. Teschemaker*, 24 Id. 544.

Judgment affirmed, and *remittitur* directed to issue forthwith.

PAYMENT OF JUDGMENT BY ONE OF SEVERAL DEFENDANTS, when a satisfaction of the judgment in favor of the others: *Brown v. White*, 80 Am. Dec. 226, and cases collected in note 228.

ONE JUDGMENT MAY BE SET OFF AGAINST ANOTHER WHEN: *Billinger v. Tarbell*, 85 Am. Dec. 527, and note; *Skrine v. Simmons*, 91 Id. 771.

THE PRINCIPAL CASE IS CITED to the point that where a reasonable doubt exists as to whether an act is repugnant to the constitution, its constitutionality should be affirmed, in *University of California v. Bernard*, 57 Cal. 613.

MARSHALL v. BUCHANAN.

[85 CALIFORNIA, 264.]

ACTION LIES FOR FALSE AND FRAUDULENT REPRESENTATION, whereby another has sustained damage.

CREDITOR IS ENTITLED TO RELIEF ON AVERRING AND PROVING THAT HIS DEBTOR, in anticipation of a judgment against him, fraudulently conveyed his property to another who was privy to the fraud, with the intent to hinder and delay the creditor, who thereafter obtained judgment and levied his execution on the property in the hands of the fraudulent grantee, but was afterwards induced to release the levy on the false and fraudulent representations of the grantor, and to permit his judgment to become barred by the statute of limitations by reason of similar false representations by the judgment debtor, to the effect that he had no property, and was insolvent; and that he discovered the fraud but recently before the commencement of the action.

LAW AFFORDS NO IMMUNITY TO FRAUDULENT DEBTOR, who, by his deceitful practices, induces his creditor to forbear his efforts to collect his debt until after it has become barred by lapse of time.

THE opinion states the case.

Nathaniel Bennett and F. D. Colton, for the appellant.

J. McM. Shafter and Bradley Hall, for the respondent.

By Court, CROCKETT, J. The appeal in this case is from a judgment in favor of the defendant upon a demurrer to the complaint. The facts, as set forth in the complaint, are substantially that the plaintiff obtained a money judgment against the defendant, and caused an execution thereon to be levied on certain property as the property of the defendant, and which was of sufficient value to have satisfied the debt; that whilst said action was pending, and before judgment thereon, the defendant fraudulently, and without consideration, conveyed the property to one Beggs for the purpose of hindering, delaying, and defrauding the plaintiff, and "with the intent to and for the purpose of inducing the said plaintiff to think and believe that he, the said John Buchanan, had no property, and would thereafter have no property, and to fraudulently induce him, the said plaintiff, to let said judgment run without renewal until the statute of limitations should have run against it"; that the conveyance was in writing, duly executed and delivered, and the possession of

the property was delivered to Beggs; that whilst the property was so in the possession of Beggs, the plaintiff caused his execution to be levied on it as the property of the defendant; that thereupon Beggs claimed the property as his; and whilst it was thus in the hands of the sheriff under the execution, the defendant, with the intent to defraud the plaintiff, and to induce him to surrender the property, and to release it from the levy, and to cause the plaintiff to believe that the defendant had no property, and to induce him to suffer his judgment to be and remain without further suit until the statute of limitations should run against it, and to hinder the plaintiff from obtaining satisfaction of said judgment and execution, willfully, falsely, and fraudulently represented to the plaintiff and to the sheriff that the property levied upon was the property of Beggs, and that the conveyance to him was in good faith and for a valuable consideration; that the plaintiff, being deceived by these representations, and believing them to be true, and having no means to ascertain the contrary, and not knowing to the contrary, released the property from the levy, and thereby lost his debt; that within five years next after the date of the judgment, the plaintiff was unable to find any property of the defendant wherewith to satisfy any part of the judgment, — during all which time the defendant had no property in his possession, and none except that conveyed to Beggs. The complaint further avers that after the expiration of five years, an action was commenced against the defendant on the judgment, to which he pleaded the statute of limitations; and the plea being found good, judgment was rendered for the defendant in March, 1861; after which, to wit, in February, 1863, Beggs reconveyed the property to defendant; that the plaintiff, being deceived by the false and fraudulent representations of the defendant, and believing therefrom until long after said five years had expired that the defendant had no property, and that the judgment was of no value, failed for that reason to bring his action on the judgment until after five years had elapsed.

The complaint further avers that the fraud in the conveyance to Beggs was not discovered by the plaintiff until within two years next before the commencement of this action, to wit, until about January 1, 1866, the complaint being filed in February, 1867.

The district court sustained a demurrer to the complaint, and the plaintiff has appealed.

That an action lies for a false and fraudulent representation whereby another has suffered damage, may be stated as a general proposition, which is too familiar to require comment. The demurrer admits the truth of every material fact alleged in the complaint; and without recapitulating these facts, we make the following summary of them, to wit, that the defendant had sufficient property to pay the plaintiff's debt, and in anticipation of the judgment against him, fraudulently conveyed all his property to Beggs; that after this property was seized under the plaintiff's execution, the defendant falsely and fraudulently represented to the plaintiff that the conveyance to Beggs was fair and *bona fide*; that the plaintiff had no means of ascertaining the falsity of this statement, and believing it to be true, released the property from the levy; that the defendant had no visible property in his possession; and believing that the judgment was worthless, the plaintiff allowed the statute of limitations to run against it; that after escaping from the judgment in this way, the defendant procured a reconveyance from his fraudulent confederate Beggs, and is now in possession of the property; that the plaintiff did not discover the fraud until shortly before the commencement of this action.

If these allegations be true, it is impossible to escape the conclusion that there was a false and fraudulent representation by the defendant, by means of which the plaintiff, without any fault or negligence on his part, lost his debt.

The counsel for the defendant makes but two points in support of the demurrer, to wit: 1. That the plaintiff suffered no damage by the fraudulent representation; and 2. That the plaintiff has shown no diligence to discover the fraud.

On the first point his proposition is, that the judgment, notwithstanding the fraud, remained in force for five years, during all of which time it might have been enforced; and if the plaintiff had discovered the fraud immediately he could not have recovered another judgment founded on the fraud, because he already had a judgment for the same debt; and he insists that if the plaintiff could not originally have recovered for the fraud, he cannot do so now. In other words, the argument is, that having had a valid judgment under which the fraud might have been exposed, the plaintiff was not damaged by being deprived of the opportunity to obtain a second judgment, which would have been no more effectual than the first.

This argument is more sophistical than sound. The *gravamen* of the action is, that by reason of the false and fraudulent representations of the defendant, the plaintiff was induced to take no steps to enforce the first judgment until after it became barred by the statute. We are aware of no principle of law which affords immunity to a fraudulent debtor, who by his deceitful practices induces the creditor to forbear his efforts to collect his debt until after it has become barred by lapse of time. Every principle of reason and justice demands that a fraud of this nature should not be allowed to deprive the creditor of his just rights.

On the question of diligence the averments of the complaint are sufficient. If the defendant by his fraudulent practices afforded just grounds to believe that he had no property, it cannot be imputed as negligence to the plaintiff that he failed to discover the secret fraud practiced between Beggs and the defendant. The allegation that a defrauded creditor has been tardy in his efforts to unravel the fraud comes with a bad grace from those who secretly concocted it.

Judgment reversed, and the court below ordered to overrule the demurrer, with leave to answer.

FRAUDULENT CONVEYANCE, WHO MAY IMPEACH, AND WHO BOUND BY: *Carpenter v. McClure*, 91 Am. Dec. 370, and note 374; *Cramer v. Reford*, 90 Id. 594; *Vasser v. Henderson*, 90 Id. 351.

COMPLAINT IN ACTION FOR RELIEF ON GROUND OF FRAUD: See *Boyd v. Blankman*, 87 Am. Dec. 146; plea alleging fraud, requisites: *Goodrich v. Reynolds*, 86 Id. 240, and note 243; *Jenkins v. Long*, 81 Id. 374.

ELEMENTS OF FRAUDULENT REPRESENTATION: *Jenkins v. Long*, 81 Am. Dec. 374, and cases collected in note 376.

FALSE REPRESENTATION, WHEN ACTIONABLE: *Page v. Parker*, 80 Am. Dec. 172, and note 183.

MACDOUGALL v. MAGUIRE.

[85 CALIFORNIA, 274.]

IN ACTION FOR DAMAGES FOR ASSAULT AND BATTERY, LANGUAGE OF DEFENDANT, used at the time of making the assault, is admissible in evidence for the purpose of characterizing the act, as bearing on the question of malice.

IN ACTION FOR DAMAGES FOR ASSAULT AND BATTERY, DEFENDANT CANNOT SET UP, by way of counterclaim, a libel published by the plaintiff of and concerning the defendant.

OBJECTION TO LIBEL SET UP IN ANSWER AS COUNTERCLAIM, in an action for an assault and battery, is not waived by a failure to demur, and evidence to support it is inadmissible.

TESTIMONY RULED OUT BY COURT FOR ONE PURPOSE, BUT ADMITTED FOR ANOTHER, can only be considered by the jury for the purpose for which it was received.

ACTION for assault and battery, without any averment of *alia enormia*, or any claim for injury to character. The alleged libel was published one day before the assault. Judgment for the defendant, and the plaintiff appealed. Other facts appear in the opinion.

Henry E. Highton, for the appellant.

Clarke and Carpentier, for the respondent.

By Court, SAWYER, C. J. This is an action for assault and battery. The plaintiff testified as to the assault committed by the defendant, and stated that while making the assault the defendant applied bad language to him. He was then asked to "state the exact language used by Maguire, the defendant, on that occasion." The defendant objected on the ground of irrelevancy, and on the ground that if the language was slanderous, it would form the subject-matter of another distinct action, and could not be introduced under the pleadings to aggravate the damages, or for any purpose. The objection was sustained, and the testimony excluded. Plaintiff excepted. It does not appear what the language was which plaintiff desired to prove. But the language used at the time of making the assault was a part of the *res gestæ*, and such language is admissible in evidence for the purpose of characterizing the act, as bearing upon the question of malice. While matter not pleaded cannot be shown in evidence for the purpose of serving as a basis for special damages, or establishing an independent cause of action, yet malice, or want of malice, may be shown when exemplary damages are allowable, for the purpose of aggravating or mitigating general damages, and the language used at the time of the assault will ordinarily illustrate the motive and condition of mind of the assaulting party, and characterize the act. Greenleaf states the rule thus: "The manner, motives, place, and circumstances of the assault, however, though tending to increase the damages, need not be specially stated, but may be shown in evidence. Thus, where the battery was committed in the house of the plaintiff, which the defendant rudely entered, knowing that the plaintiff's daughter-in-law was there sick and in travail, evidence of this fact was held admissible

without a particular averment. Nor are the jury confined to the mere corporal injury which the plaintiff has sustained; but they are at liberty to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon to award such exemplary damages as the circumstances may in their judgment require": 2 Greenl. Ev., sec. 89. And Saunders says: "The plaintiff should prove as many distinct assaults as there are counts, and all the allegations contained therein, by going into the circumstances of his case at length, as to the manner in which the assault and battery was committed, the defendant's conduct and expressions, the degree of violence used, and the extent of the injury": 1 Saund. Pl. & Ev. 152.

We think the evidence admissible for the purpose indicated, but not as a ground of special damages, or to prove an independent cause of action.

The defendant, as a substantive, affirmative cause of action, set up, by way of a counterclaim, a libel published by the plaintiff concerning the defendant. After the plaintiff rested, the defendant offered to prove the libelous matter set up in the answer as a special defense and as a counterclaim. Plaintiff objected, on the ground that the facts set up constituted no justification, and were not admissible as matter in mitigation of damages, and on the further ground that the matter did not constitute a counterclaim within the meaning of the provisions of the practice act, which the defendant was authorized to set up, or prove, in this action. The court sustained the objection as to the first two grounds, and excluded the evidence for the purpose of justification, or mitigation, of damages. But the court was of opinion that the objection on the last ground should have been taken by demurrer, and as the plaintiff had not demurred the objection was waived. The testimony was therefore admitted to establish the counterclaim, and plaintiff excepted to the ruling admitting the testimony. In this respect, also, we think the court erred. The defendant was authorized by section 46 to set up "a counterclaim constituting a defense." Section 47 defines the term "counterclaim" in the following language: "The counterclaim mentioned in the last section shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of

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action arising out of the transaction set forth in the complaint or answer as the foundation of the plaintiff's claim or defendant's defense, or connected with the subject of the action. 2. In an action arising upon contract. Any other cause of action arising also upon contract and existing at the commencement of the action." The matter set up is clearly not a counterclaim within the meaning of this provision: *Pattison v. Richards*, 22 Barb. 143; *Murden v. Priment*, 1 Hilt. 76; *Barhyle v. Hughes*, 33 Barb. 320; *Schnaderbeck v. Worth*, 8 Abb. Pr. 38. We do not think the objection waived by failure to demur. The ground of demurrer is not a misjoinder of defenses; but it is, that the matter is not recognized by the law as a defense to the action. The party may have an independent cause of action, but it has no relation to the pending action. As it is not recognized by the law as a defense, we see no good reason why the objection may not be taken at any time. The cases already cited are authority on this point also. The question did not arise in either of them on demurrer. In *Pattison v. Richards*, *supra*, the testimony had all been taken, and the judge charged the jury that the matter set up in the answer, and proved, was not a counterclaim within the meaning of the code, and constituted no defense to the action. This ruling was sustained on appeal. The court said: "If the defendant has a remedy against the plaintiff upon the matter set up, he must seek it in a separate suit": *Pattison v. Richards*, 22 Barb. 146. So in *Barhyle v. Hughes*, 33 Id. 321, the action was assault and battery, and an assault by plaintiff was set up as a counterclaim. There was no replication to the new matter, and at the close of the testimony the court charged the jury that the assault set up in the answer could not be set up, in any view, as a defense or counterclaim; that defendant must bring his cross-action; and this ruling was sustained on appeal. In *Schnaderbeck v. Worth*, 8 Abb. Pr. 38, the question arose, as in this case, on objection to the testimony offered by the defendant. In *Murden v. Priment*, 1 Hilt. 76, it does not appear in what precise form the question was raised.

While the objection might have been taken by demurrer, we think it was not waived by failure to demur.

It is, however, insisted by respondent's counsel that matters set up in the answer, if improperly admitted as evidence in support of the counterclaim, were still admissible to show the exciting cause of the assault in mitigation of damages, and, on this ground, there could be no injury. But if it be con-

ceded that the evidence was admissible in mitigation of damages, it was ruled out for that purpose on objection of respondent, and admitted only in support of the counterclaim, as a substantive cause of action in favor of defendant, and the jury could only have considered it in that aspect.

The consequences may have been very different to the plaintiff. The terms "aggravation" and "mitigation of damages" relate to the question of exemplary or punitive damages.

Damages, in an independent cause of action in favor of defendant against a plaintiff, are an entirely different matter, and the one is in no respect the equivalent of the other, either in law or as matter of fact, and the error committed cannot be compensated in the mode proposed by respondent.

The propriety of the ruling in excluding the evidence for the purpose of mitigating the damages is not before us on this appeal.

Judgment and order denying new trial reversed, and new trial granted.

ASSAULT, WHAT CONSTITUTES: *State v. Davis*, 35 Am. Dec. 735, and note 737.

ASSAULT AND BATTERY, justification of, under plea of *noliter manus imposit*: *French v. Martin*, 57 Am. Dec. 294; damages recoverable in action for: *Barnes v. Martin*, 82 Am. Dec. 670, and note.

SCOPE AND OFFICE OF COUNTERCLAIM UNDER CODE SYSTEM OF PLEADING: *Woodruff v. Garner*, 89 Am. Rep. 477, and extended note 482, 487.

TULLY v. HARLOE.

[85 CALIFORNIA, 302.]

WHERE ANSWER IN REPLEVIN DOES NOT DENY VALUE OF PROPERTY alleged in the complaint, evidence as to its value should not be admitted.

NEW TRIAL WILL NOT BE GRANTED ON GROUND that the court erroneously permitted the respondent to introduce evidence upon a matter not denied in the answer, if the appellant was not prejudiced thereby.

MORTGAGE GIVEN IN GOOD FAITH FOR GREATER SUM THAN IS DUE BY MORTGAGOR TO MORTGAGEE, to secure both a present indebtedness and future advances, is not fraudulent as to the creditors of the mortgagor because given for a greater sum than is due, although the mortgage does not express upon its face that the excess is for future advances.

MORTGAGE GIVEN IN GOOD FAITH TO SECURE FUTURE ADVANCES is a good and valid security; and such mortgage need not express its object upon its face, though it would be better if it did.

MORTGAGE KNOWINGLY GIVEN FOR LARGER AMOUNT THAN IS DUE, and not as security for future advances, is fraudulent in law as to the creditors of the mortgagor.

MORTGAGE IS LIABLE TO SUSPICION, and ought to be critically examined, when it misrepresents the transaction between the mortgagor and mortgagee.

IT IS QUESTION OF FACT FOR JURY, under proper instructions from the court, whether a mortgage given for a greater sum than is due was given in good faith, both for a present indebtedness and to secure future advances.

REPLEVIN for a number of sacks of oats. One Hogle executed a mortgage to the plaintiffs upon a crop of oats growing on land which he rented from Denniston, and the plaintiffs claimed to have taken possession of the crop and harvested it. After the grain was sacked, Hogle gave Denniston a bill of sale of it for an indebtedness to him of about two thousand dollars. Denniston shipped the oats to San Francisco, and on its arrival this suit was brought. The jury found the highest value of the property between the time of conversion and trial, and gave a general verdict for the plaintiffs. The defendant appealed, claiming that the court erred in the admission of the market value of the oats at the time of the rendition of the verdict, and that evidence was only admissible of the market value at the time of the conversion. Other facts appear in the opinion.

Sharp and Lloyd, for the appellant.

Elisha Cook, for the respondents.

By Court, **SANDERSON, J.** 1. The judgment was for a larger sum than was claimed at the commencement of the action, but it appears from an amendment which has been made to the transcript by leave of this court, granted since the filing of the appellant's opening brief, that the complaint was amended by leave of the district court before the commencement of the trial, and that the amount claimed by the amended complaint was in excess of the sum for which judgment was given. This amendment of the transcript has therefore obviated the objection of the appellant to the judgment, whether meritorious or not, on the ground that it is in excess of the amount sued for.

2. The objection of the appellant to the admission of evidence as to the value of the property in suit should have been sustained, for the value alleged in the complaint was not denied by the answer, and therefore there was no issue as to the value to be tried. But the appellant was not prejudiced by the respondents going into evidence as to the value.

On the contrary, had they not done so, they would have been entitled to a verdict for the full amount alleged in the complaint.

The claim in this connection that the court mistook the measure of damages can have no place in the consideration of the case. There was no such question involved in the case. As already suggested, there was no issue as to the value of the property; there could, therefore, be no question as to the amount which the respondents were entitled to recover, if they recover at all. The property was alleged to be of the value of \$3,475 by the respondents, which was not denied by the appellant, but admitted, because it was not denied. The verdict and judgment was for \$2,887.49, which is \$587.51 less than the amount which the respondents were entitled to recover, if they recovered at all. The court undoubtedly erred in going into the question as to damages at all, but as the appellant gained a saving of \$587.51 by the error, we are unable to perceive why he should complain.

3. The principal question involved in the case, and perhaps the only one requiring special notice, relates to the alleged fraudulent character of the mortgage under which the respondents claimed a right to the possession of the property in suit.

Upon its face, the mortgage was for the sum of three thousand dollars, but the amount actually due from Hogle to the respondents at the time the mortgage was given was only \$1,704.20. The excess of the mortgage over the debt was taken as security for future advances, as claimed by the respondents, but there was no statement to that effect contained in the mortgage itself. In view of the fact that the mortgage was given in part to secure future advances, without its being so stated upon the face of the mortgage, it is claimed on the part of the appellant that, as a matter of law, the mortgage was fraudulent and void *ab initio* as against the creditors of Hogle, of whom Denniston, the bailor of the appellant, is alleged to have been one. This proposition, however, is not sustained by the cases cited in its support.

Taaffe v. Josephson, 7 Cal. 352, involved the validity of a judgment by default in an attachment suit upon four promissory notes, one of which was not due, and it was held that the entire judgment was fraudulent and void as against subsequent attaching creditors of the defendant in the judgment, under the twentieth section of the statute of frauds.

In *McKenty v. Gladwin, Hugg, & Co.*, 10 Cal. 227, the question was, whether a note drawing interest from date, which had been antedated, was fraudulent as to creditors, and it was held that it was.

In *Scales v. Scott*, 13 Cal. 76, it was held that a judgment upon a note which was given in advance of a portion of the consideration, and drew interest on the whole sum from date, was void as against creditors, for the reason given in *McKenty v. Gladwin, Hugg, & Co.*, *supra*.

In *Wilcoxson v. Burton*, 27 Cal. 228, it was held that the execution and delivery of a note by a debtor to his creditor for a sum greater than is actually due, for the purpose of defrauding other creditors, and a voluntary confession of a judgment thereon, renders the judgment fraudulent and void as to other creditors.

In *Diver v. McLaughlin*, 2 Wend. 600 [20 Am. Dec. 655], a mortgage was given for \$800, to secure an indebtedness of not more than \$150 dollars, and probably not more than \$100. In *Bailey v. Burton*, 8 Id. 339, a mortgage for three hundred dollars was given upon property worth five hundred dollars, to secure a liability for one hundred dollars, incurred by the mortgagee in behalf of the mortgagor. Both were held to be fraudulent.

Thus it appears that in none of these cases was the question as to the validity of a note or mortgage, given to secure future advances, involved. They merely establish the doctrine that a note or mortgage given for a greater sum than is due is void in any event, so far as the excess is concerned, and *in toto* unless satisfactorily explained.

It is well settled that a mortgage or judgment made or taken in good faith, for the purpose of securing future advances, or debts expected to be contracted in the course of dealings between the parties, is a good and valid security: 4 Kent's Com. 175; *Commercial Bank v. Cunningham*, 24 Pick. 274; *United States v. Hoe*, 3 Cranch, 73; *Brinkerhoff v. Martin*, 5 Johns. Ch. 326; *Frye v. Bank of Illinois*, 11 Ill. 381.

It is also well settled that a mortgage given to secure future advances need not express the object upon its face, though it would be better if it did: *Shirras v. Caig*, 7 Cranch, 34; *Craig v. Tappin*, 2 Sand. Ch. 78; *Lyle v. Ducomb*, 5 Binn. 585; *Stover v. Herrington*, 7 Ala. 143 [41 Am. Dec. 86].

The true principle deducible from the foregoing cases seems to be, that a mortgage knowingly and intentionally given and

taken for a larger amount than is due, and not as security for future advances, is fraudulent as against the other creditors of the mortgagor; but that a mortgage given in good faith, in whole or in part to secure future advances, whether the object be expressed in the mortgage or not, is valid to the extent of the lien therein expressly created. It must show upon its face the utmost amount intended to be secured, but it need not show whether that amount represents an existing debt or future advances.

A mortgage which misrepresents the transaction between the mortgagor and mortgagee is liable to suspicion, and ought to be critically examined; but if, upon investigation, the real transaction turns out to be fair, and to have been had in good faith, it would be unjust to deprive the person claiming under it of his equitable rights. It is always better, however, for obvious reasons, that the mortgage should be drawn so as to show the true object and purpose of the transaction, for suspicion is engendered by misrepresentation, but disarmed by a statement of the truth: *Shirras v. Caig*, 7 Cranch, 34.

4. It is provided by the twenty-third section of the statute of frauds that, in all cases arising under its provisions, the question of fraudulent intent shall be deemed a question of fact, and not of law. The question whether the mortgage was taken in good faith to secure an existing debt and future advance to the amount, both included, of three thousand dollars, or with intent to hinder or delay the other creditors of Hogle, was for the jury to determine, under proper instructions from the court. The instructions of the court have not been brought up, and it must therefore be assumed that they were in all respects consistent with the law of the case.

Upon the evidence alone, either in respect to the question of fraudulent intent or the immediate delivery of the crop when harvested, we cannot disturb the verdict.

Order denying a new trial affirmed.

RHODES, J., did not express an opinion.

REPLEVIN, WHEN IT LIES, AND NATURE OF ACTION OF: *Oleson v. Merrill*, 91 Am. Dec. 428, and cases collected in note 432.

NEW TRIAL, ERROR IN ADMITTING OR REFUSING EVIDENCE as ground for: *Kent v. Lawson*, 74 Am. Dec. 233; *Winkley v. Forge*, 66 Id. 717, 720, note; the admission of immaterial testimony which works no injury is not sufficient ground for a new trial: *Winona etc. R. R. Co. v. Waldron*, 88 Id. 100; and newly discovered evidence is not ground for a new trial, if it would not

change or modify the result: *Teal v. State*, 68 Id. 432; *McClusky v. Gerhauser*, 90 Id. 512; and see *Lynd v. Pickett*, 82 Id. 79.

MORTGAGES TO SECURE EXISTING DEBT AND FUTURE ADVANCES, VALIDITY OF: *Googins v. Gilmore*, 74 Am. Dec. 472, and cases collected in note 475; *Ladue v. Railroad Co.*, 87 Id. 759, and note 773.

McCONNELL v. DENVER.

[35 CALIFORNIA, 365.]

DITCH COMPANIES FOR SALE OF WATER, NATURE OF. — Ordinary unincorporated ditch companies, organized for the sale of water to miners and others, the stock in which is bought and sold at the pleasure of the owners, without consulting their co-owners, have some of the incidents of ordinary partnerships, but differ therefrom, and are more in the nature of tenancies in common.

MEMBER OF UNINCORPORATED DITCH COMPANY HAS NO GENERAL AUTHORITY by virtue of such membership to bind the company by his contracts.

SUPERINTENDENT OR MANAGING AGENT OF UNINCORPORATED DITCH COMPANY CANNOT BIND the company, by a promissory note, given for materials used by the company, unless authority to do so is conferred upon him by the company, either expressly or by necessary implication from his acts recognized by the company, with full knowledge of the acts at the time of recognition.

MEMBERS OF UNINCORPORATED DITCH COMPANY ARE BOUND BY NOTE duly authorized to be given by its superintendent for materials before then purchased by the company, whether they were such members when the materials were purchased or not.

PERSON FURNISHING MATERIALS TO UNINCORPORATED DITCH COMPANY IS NOT ENTITLED to recover a deficiency against the members of the company, under an agreement for payment out of the proceeds of the ditch of the company, all of such proceeds having been faithfully applied in payment.

Action on a promissory note as follows:—

“\$2,600.

COLOMA, June 7, 1862.

“On or before the first day of October next, the Coloma Canal Company promise to pay Samuel McConnell and Company the sum of two thousand six hundred dollars.

“A. ST. C. DENVER,

“Secretary and Agent for the Coloma Canal Co.”

This company, in the winter of 1861–62, consisted of the defendants Denver and three others, and one Mrs. Robinson. Its property was a ditch for the conveyance of water, and the interests were held by the owners in different proportions, in shares, represented by certificates of stock. For about one year prior to June 2, 1862, the shares owned by Mrs. Robinson had been in the hands of the defendant Latham, as a pledge

to secure money she owed him, and on the date mentioned Latham became absolute owner of them. The defendant Denver had acted as superintendent of the company for several years, and at his request the plaintiff and Samuel McConnell, who were at the time partners, furnished lumber for the company to repair the flume, which had been injured during the flood in the winter of 1861-62; and at the plaintiff's request, Denver gave the note above set out, on the day of its date. Several payments had been made on the note before the commencement of this action by the plaintiff, who brought suit as the surviving partner of Samuel McConnell, who died in 1865. The action was dismissed as to the defendant Latham, and judgment rendered against the other defendants, except Weller, who had not been served with summons. The defendants against whom judgment was rendered appealed; and the plaintiff appealed from the portion of the judgment in favor of the defendant Latham. Other facts appear in the opinion.

Bowie and Catlin, for the defendants and appellants.

Robert Robinson, for the plaintiff and respondent.

By Court, SAWYER, C. J. We think the evidence insufficient to justify the third finding, to the effect that the defendants executed the note upon which the action is brought, by their agent, Denver, and that said Denver had full power and authority to make and execute said note, by virtue of his being a partner in and agent for the company.

There is no conflict in the evidence as to the material facts in the case, and it shows that the defendants constituted one of the ordinary unincorporated ditch companies so common in the mining regions, owning a ditch which conveyed water from a certain stream to a distant mine, for sale to the miners for mining purposes. The interests were held by the owners in different proportions, in shares, represented by certificates of stock, which were bought and sold at the pleasure of the owners, without consulting their co-owners. The ordinary relations of the stockholders in these associations, like those in the usual mining companies, organized and conducted upon similar principles, and sometimes called mining partnerships, are not those of strict commercial partnerships, but are more in the nature of tenancies in common: *Bradley v. Harkness*, 26 Cal. 77; *Skillman v. Lachman*, 23 Id. 201 [83 Am. Dec. 96]; *Duryea v. Burt*, 28 Id. 587; *Abel v. Love*, 17 Id. 237; *Settembre v. Putnam*,

30 Id. 493. Some of the incidents of a partnership pertain to them, and some of mere tenancies in common, but the powers of the several members by virtue of being members are different from those of commercial partnerships. A member of one of these associations has no general authority, by virtue of such membership, to bind the company by his contracts. Nor has the managing agent any authority other than that conferred upon him, either expressly or by necessary implication from his acts recognized by the company, with full knowledge of the acts at the time of the recognition: *Skillman v. Lachman, supra*. The finding of the court evidently resulted from overlooking this distinction between commercial partnerships and associations of this character. The remarks of the court in *Skillman v. Lachman, supra*, are in point: "But there is still a more important objection to the findings and judgment in this case. There was no evidence of any authority having been given by the company or Lachman to Sprout, a member of the company, and the managing agent or foreman, to execute a promissory note in the name of and binding the company for the indebtedness due the plaintiff, or any general authority to that effect. In fact, several members, including Lachman, testified that they never gave any such authority. It is clear that the law does not, in the case of mining partnerships, imply any such authority, either to a member of such partnership or to its managing agent. In this respect the law is different from that of ordinary commercial partnerships. It was clearly the duty of the plaintiff to prove that the person executing the note in the name of the company had power and authority to do so. He might have had power to purchase the lumber for the use of the mine, but that is very different from authorizing him to execute a note in the name of the company, bearing interest at the rate of three per cent per month."

So, in the present case, there was not only no evidence to show that Denver had express authority to execute the note, but it was affirmatively shown that he had not; and it was further shown that one of the members at least, who is defendant, had expressly declared to him that he would not consent to the incurring of any personal responsibility in any form whatever. The making of notes was no part of the ordinary business of the company, nor was it a necessary incident to its business, nor the practice of the company in conducting its business. It owned a ditch and sold water, and those who managed it collected the moneys paid for water, paid the va-

rious expenses out of the receipts, and divided the balance among the owners. This, according to the testimony, was the regular course of its business for a series of years, from somewhere about 1854 down to 1862, when the note in suit was given. There is nothing to show that any authority was ever given to the managing agent, either expressly or by necessary implication, to execute notes, or that any such authority was ever recognized by the stockholders. Only two instances, besides the one in question, of giving a note by the managing agent, are shown during the whole existence of the company, and these two notes were connected with the same general transaction as the one in suit; and, so far as the evidence shows, these were also given without the knowledge or assent of the owners, other than the agent himself. The agent testifies that the instances referred to are the only ones that occurred during his management. In the case now in question, the agent also testifies that when Samuel McConnell asked him for the note, he informed him that he had no authority to execute one. He further testifies that the arrangement, in fact, was, that the lumber, for which the note was given, was furnished for the extensive repairs of the ditch, made upon the express agreement that it was to be paid for out of the proceeds of the sales of water; and it appears that the proceeds were all applied in payment. The evidence shows that the owners, so far as they were informed upon the subject at all, were informed that this was the arrangement, and none of them knew of or assented to the execution of any note at all.

We think the evidence not only shows that there was no express authority given to Denver to execute the note in suit, but also that none can be inferred from the general course of the business of the company, or implied from any authority exercised by the agent with the knowledge or assent of the owners. It also appears that such as expressed their views positively refused to allow any personal responsibility to be incurred in making the large repairs required by the damage done by the floods of 1862, and that Samuel McConnell, when he took the note, was expressly informed by Denver that he had no authority to execute it. The case is clearly within the decision of *Skillman v. Lachman*, 23 Cal. 201 [83 Am. Dec. 96].

Upon the findings, the judgment should have been against Latham, as well as the other defendants. The note purports to be the note of the company, and the third finding is, that

Denver had authority to make and execute the note. The sixth finding is entirely consistent with the third, and finds that Latham was a member of this company at the time of the execution of the note sued on. If he was a member when the contract sued on was made, and the contract was executed by a party duly authorized, he must, of course, be bound by it, as well as the other members.

The judgment and order denying a new trial must be reversed, and a new trial had; and it is so ordered.

SANDERSON, J., being disqualified, did not participate in the decision.

UNINCORPORATED SOCIETIES, SUITS BY AND AGAINST: *Phipps v. Jones*, 59 Am. Dec. 708, and note 711.

MINING ASSOCIATION, LIABILITIES OF MEMBERS: *Eagle v. Bucher*, 67 Am. Dec. 342.

VOLUNTARY ASSOCIATIONS, NATURE OF, ETC.: *Austin v. Searing*, 89 Am. Dec. 665, and extended note 671.

DISTINCTION BETWEEN SIMPLE PARTNERSHIP AND INCORPORATED ASSOCIATION POINTED OUT: *Pacific R. R. v. Hughes*, 64 Am. Dec. 265; *Martin v. Railroad Co.*, 73 Id. 713.

THE PRINCIPAL CASE IS DISTINGUISHED in *Jones v. Clark*, 42 Cal. 194, as a case in which the note was given contrary to the terms of the contract, and had not been recognized as valid in any way.

ESTATE OF NERAC.

[85 CALIFORNIA, 392.]

CREDITOR MAY SUE HIS DEBTOR, WHO IS IMPRISONED IN STATE PRISON for a term less than his natural life, and may subject the property of such debtor to the satisfaction of his debt during the term of his imprisonment.

FORFEITURES AND DISABILITIES IMPOSED BY COMMON LAW upon persons attainted of felony are unknown to the laws of California; and a conviction of felony is followed by no consequences except such as are declared by statute.

PROBATE COURT HAS NO POWER TO APPROPRIATE SHARE OF HEIR OR DEVISEE to the payment of his debts, even though the debt is in judgment, and the devisee is in state prison under a conviction of felony. It can do no more than pay the claims against the estate, and distribute the remainder among the heirs and devisees.

ONE IS NOT DEAD IN LAW who is sentenced for a felony to the state prison for a term less than his natural life. Though his civil rights are in some matters suspended, the rights of his creditors are not suspended.

AFTER DECREE OF DISTRIBUTION, MONEY OF DISTRIBUTEE IN HANDS OF ADMINISTRATOR MAY BE GARNISHED by a creditor of the distributee, or may be reached by proceedings supplementary to execution.

APPEAL from the probate court of the city and county of San Francisco. The opinion states the case.

Patterson, Wallace, and Stone, for the appellant.

Felton and Hittell, for the respondent.

By Court, SANDERSON, J. The case shows that Ellen Nerac died on the 11th of November, 1863, leaving a last will and testament, by which she bequeathed her entire estate to Adrien Sagiel; that after administration, there was left of the estate, in the hands of the administrator, the sum of \$1,320.10, coming, by virtue of the will, to Sagiel; that on the 26th of November, 1862, Sagiel was convicted of a felony, and sentenced to imprisonment in the state prison for the term of fifteen years, and that he is now in the state prison under and by virtue of said sentence; that on the eighth day of April, 1867, one Knox recovered a judgment against Sagiel for the sum of five hundred dollars and costs, which he afterwards assigned to one Clark, who is the appellant in this case; that on the 13th of March, the administrator petitioned the probate court for a decree of distribution. At the hearing, Clark appeared and presented his judgment, duly authenticated, and petitioned the court to apply so much of the money coming to Sagiel as would be required for that purpose to the payment and satisfaction of his claim.

The court denied the petition of the appellant, and directed the money to be paid to Sagiel upon the termination of his imprisonment, either by pardon or by the expiration of the term.

It is suggested by counsel that the denial of appellant's petition was founded in part by the court below upon section 145 of the act in relation to crimes and punishments, which provides that a "sentence of imprisonment in the state prison for a term less than life suspends all civil rights of the persons so sentenced during the term of imprisonment, and forfeits all public offices and all private trusts, authority, and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead."

By this provision of the statute, the civil rights of Sagiel were suspended during the term of his imprisonment, except as hereinafter stated; but the civil rights of Knox and Clark were not suspended. The former had a right to sue, and the latter has a right to subject the property of Sagiel to the satis-

faction of his judgment; for the sentence worked no forfeiture of Sagiél's estate.

The forfeitures and disabilities imposed by the common law upon persons attainted of felony are unknown to the laws of this state. No consequences follow, except such as are declared in the section to which we have referred. If the convict be sentenced for life, he becomes *civiliter mortuus*, or dead in law, in respect to his estate, as if he was dead in fact. If, however, he be sentenced for a term less than life, his civil rights are only suspended during the term, and he forfeits only all public offices and private trusts, authority, and power.

What power he may retain over his estate, or how the same is to be cared for during his imprisonment, it is unnecessary to consider for the purposes of the present case, or what is to be considered as the full effect of the "suspension" for which the statute provides. In New York, it is provided that a person imprisoned in the state prison for a term less than life shall be deemed to be an absconding debtor, and be dealt with according to the provisions of the statute in relation to that class of persons. So far as we are advised, there has been no legislation upon the subject in this state, except the act of May 6, 1862 (Stats. 1862, p. 596), concerning conveyances, by which persons confined in the state prison are allowed to make deeds and other instruments in the mode there prescribed, with the like force and effect as if they were not so confined.

There being, then, no special mode provided by which creditors can reach the property of persons confined in the state prison for a term less than life, and subject it to the satisfaction of their claims, it follows that they must have precisely the same means which they have in other cases. The mode attempted in this case, however, is unauthorized, so far as we are advised, by any provision of law. Under the probate act, the probate court can do no more than pay the claims against the estate, and distribute the remainder among the heirs and devisees, or direct the administrator to do so. It has no power to appropriate the share of an heir or devisee to the payment of his debts. That would be to administer upon his estate before he is dead in law or fact. The only ground upon which that court could take possession of Sagiél's money and apply it to the payment of Clark's judgment, would be that Sagiél is dead in law or in fact. As we have

seen, he is neither dead in law nor in fact. The probate court pays the debts of the dead, and not of the living.

Counsel seem to be under the impression that there is no other way to reach the money in question, and therefore that the mode attempted must be allowed; and in support of that proposition, we are cited to cases which hold that money in the hands of the officers of the law cannot be reached by attachment.

It may be conceded that prior to a decree of distribution the money in the hands of an administrator cannot be reached by attachment or execution against the creditors, heirs, or devisees of the estate. If it be so, Clark is no worse off than he would be if Sagiel was out of prison, instead of in it. But we do not consider that the rule in question holds good after the decree of distribution has been made. By the decree each share is finally and definitely ascertained, and a cause of action thereafter exists against the administrator in favor of the distributee, and we are unable to perceive why, on the score of public policy, or anything else, the money thus judicially determined to be due from the administrator to the distributee should not be within the reach of the creditors of the latter. We are aware that at an early day the contrary was held in some states, — Massachusetts, Connecticut, Maine, and Arkansas. But in some of them the rule has been changed since by statute. It was held as indicated by us, however, in New Hampshire, Vermont, Delaware, Missouri, and Alabama: *Drake on Attachment*, secs. 492 et seq. We consider it clear that after distribution has been decreed an executor or administrator may be garnished, or, if judgment has been already obtained against the distributee, that the money in their hands may be reached by execution or proceedings supplementary thereto: *Practice Act*, secs. 238 et seq.

Upon the question first considered by us, the following authorities are more or less in point: 1 *Chitty's Crim. Law*, 724; *Foster's Crim. Law*, 61-63; *Banyster v. Trussel*, *Cro. Eliz.* 516; *Vin. Abr.*, tit. Attainder; *Ramsay v. McDonald*, 1 *Wm. Black.* 30; *S. C.*, 1 *Wils.* 217; *Dunham v. Drake*, 1 *N. J. L.* 315; *Coppin v. Gunner*, 2 *Ld. Raym.* 1578; *Harvey v. Jacob*, 1 *Barn. & Ald.* 159; *Barrett v. Power*, 25 *Eng. L. & Eq.* 524; *Platner v. Sherwood*, 6 *Johns. Ch.* 118; *Davis v. Duffie*, 8 *Bosw.* 617.

Judgment affirmed.

RHODES, J., expressed no opinion.

PROBATE COURTS, JURISDICTION OF: *Little v. Birdwell*, 73 Am. Dec. 242; *Andrews v. Avory*, 73 Id. 335, and note 366; *Root v. McFerrin*, 75 Id. 49, and note 61; *Gregory v. Taber*, 79 Id. 219; *Estate of Harlan*, 85 Id. 58; *In re Will of Warfield*, 83 Id. 49.

ATTACHMENT OR GARNISHMENT OF FUNDS IN HANDS OF TRUSTEE: *Groome v. Lewis*, 87 Am. Dec. 563. Administrator may be garnished for sum in his hands, which on a settlement he has been adjudged to pay over: *Richards v. Griggs*, 57 Id. 240.

POLACK v. PIOCHE.

[35 CALIFORNIA, 416.]

TENANT'S GENERAL COVENANT TO REPAIR DEMISED PREMISES BINDS HIM under all circumstances, even though the injury proceeds from the act of God, from the elements, or from the act of a stranger; and if he desires to relieve himself from liability for injuries resulting from any cause whatever, he must except them from the operation of his covenant.

ACTS OF GOD, IN LEGAL SENSE, ARE THOSE ACTS which do not happen through human agency, as storms, lightnings, and tempests.

ELEMENTS ARE MEANS THROUGH WHICH GOD ACTS, and "damages by the elements" are damages by the act of God.

INJURY TO DEMISED PREMISES BY WATER IS NOT ACT OF GOD OR OF ELEMENTS, where the embankment of a natural reservoir, which is filled with water by unusual rains, is broken by a stranger, and the injury thus results; and the tenant is bound to repair, even if "damages by the elements or acts of Providence" are excepted from his covenants.

ACTION for damages for the non-performance of a covenant to repair. The judgment was for the defendant, and the plaintiff appealed. The facts appear in the opinion.

Jarboe and Harrison, for the appellant.

John B. Felton and Theodore H. Hittell, for the respondent.

By Court, SANDERSON, J. This is an action to recover damages for the non-performance of a covenant to repair. By the terms of the covenant, "damages by the elements or acts of Providence" are excepted from its operation.

The case was tried by the court below without a jury, and has been brought here upon the findings only, it being claimed that the conclusions of law, which were in favor of the defendant, are erroneous.

The facts upon which the case turns were found by the court below substantially as follows: During the term the demised premises were damaged to the amount of six thousand dollars by "a torrent of water overflowing and sweeping

through" them. The torrent was produced by the accumulation of waters from the unusual rains of 1862, which were collected in a natural reservoir in the vicinity of the premises, upon lands of some other person than the plaintiff or defendant, and separated from the demised premises by lands in the possession of and belonging to persons other than the plaintiff or defendant. In ordinary seasons, the natural embankment of the reservoir was sufficient to confine the water, or to prevent it from overflowing or breaking through, but was not sufficient for that purpose in the winter of 1862, which was remarkable for extraordinary rains and floods. Prior to the torrent which caused the damages in question, however, the embankment had been strengthened by the labor of the adjacent landowners, among whom was the defendant, so as to make it sufficient to withstand even the rains and floods of that winter; but "some person or persons unknown to the defendant, and without his knowledge or consent, interfered with the natural embankment of the reservoir, and through their agency and their interference the embankment was made to give way, and the whole body of water in the reservoir was suddenly precipitated upon the premises," causing the damages in question.

A general covenant to repair is binding upon the tenant under all circumstances. If the injury proceeds from the act of a stranger, from storms, floods, lightning, accidental fire, or public enemies, he is as much bound to repair as if it came from his own voluntary act. Such has been the settled rule since the time of Edward III.: 2 Platt on Leases, 186, 187, and cases there cited. If the tenant desires to relieve himself from liability for injuries resulting from any of the causes above enumerated, or from any other cause whatever, he must take care to except them from the operation of his covenant: *Id.* So the defendant in the present case is liable, unless, in the language of the exception contained in this covenant, the damages were caused by "the elements or the acts of Providence."

What acts are to be regarded in the legal sense as "acts of God" is well settled. Upon that question the case of *Forward v. Pittard*, 1 Term Rep. 27, is a leading authority. The plaintiff's goods, while in the possession of the defendant as a common carrier, were destroyed by fire not caused by lightning or the negligence of the defendant. The question was, whether the fire was, in the legal sense, caused by the "act of God." The court of king's bench ruled that it was not, and Lord

Mansfield said: "Now, what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by his permission; everything by his knowledge; . . . such acts as could not happen by the intervention of man, as storms, lightnings, and tempests." To the same effect are all the cases: *McArthur v. Sears*, 21 Wend. 190; *Ewart v. Street*, 2 Bail. 157; *Fish v. Chapman*, 2 Ga. 349 [46 Am. Dec. 393]; *Merritt v. Earle*, 29 N. Y. 115; *Turner v. Tuolumne Water Co.*, 25 Cal. 403. The expression excludes the idea of human agency, and if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to have been the act of God, but must be regarded as the act of man.

Can a different rule be applied to the interpretation of the expression "the act of the elements"? Is it more comprehensive than the former? Does it include acts which the former does not? The answer is not material to the present purpose; for be that as it may, for the purpose of determining the cause of a particular event, the same test must be resorted to in the one case as in the other. If an act to which human agency has in any way contributed cannot be considered as the act of God, but must be held to be the act of man, how does it become less the act of man if we substitute the elements in the place of God? The elements are the means by which God acts, and we are unable to perceive why "damages by the elements" and "damages by the acts of God" are not convertible expressions in the law of leases.

The act could not have happened in the one case more than in the other, had not the agency of man intervened. It follows that before an act can be considered the act of the elements, it must appear that no human agency intervened, for if it did, the elements cannot be regarded as the cause, but only as the means. Had the waters in question broken through the embankment of the natural reservoir in which they had accumulated without the agency of man, the loss would have fallen within the exception contained in the defendant's covenant. The case shows, however, that they would not have broken through the embankment but for the help of man. The damages in question were, therefore, caused by the act of some stranger. Against the acts of strangers, the defendant might have protected himself by excepting them from the operation of his covenant. Not having done so, however, he is liable, as we have seen, by force of his covenant.

Upon the findings, the plaintiff is entitled to judgment for the sum of six thousand dollars. The judgment is therefore reversed, and the court below directed to enter a judgment for the sum of six thousand dollars, together with the costs below and here.

PHRASE "ACT OF GOD" DEFINED AND EXPLAINED: *Transportation Co. v. Tiers*, 64 Am. Dec. 394, and note 412; *Steele v. McTyler*, 70 Id. 516; *Hays v. Kennedy*, 80 Id. 627; *Read v. Spaulding*, 86 Id. 426; the expression excludes all human agency: *Merritt v. Earle*, 86 Id. 292; *Michaels v. New York Cent. R. R. Co.*, 86 Id. 415; *Fergusson v. Brent*, 71 Id. 582.

ACT OF GOD WILL EXCUSE NON-PERFORMANCE OF DUTY CREATED BY LAW, but not of one created by contract: *School District v. Dauchy*, 68 Am. Dec. 371, and see note 375; *Mizell v. Burnett*, 69 Id. 744, and note 749.

TENANT TAKES RISK OF FUTURE CONDITION OF PREMISES LEASED AND IS BOUND TO KEEP THEM IN REPAIR, in the absence of any special agreement on the subject: *Libbey v. Telford*, 77 Am. Dec. 229, and see note 230.

EXTENT OF LESSEE'S LIABILITY UNDER COVENANT TO KEEP DEMISED PREMISES IN REPAIR, and redeliver them at the expiration of his term in as good condition as when received: *Abby v. Billups*, 72 Am. Dec. 143, and note 148; *Howeth v. Anderson*, 78 Id. 538.

LIABILITY OF LANDLORD AND TENANT RESPECTIVELY for nuisances or injuries from failure to repair: *City of Lowell v. Spaulding*, 50 Am. Dec. 775, and extended note 776; *Hayden v. Bradley*, 66 Id. 421.

COVENANTS OF TENANT TO PAY RENT AND OF LANDLORD TO REPAIR or make improvements, whether dependent or independent: *Lunn v. Gage*, 87 Am. Dec. 233, and note on subject 237.

COVENANTS TO REPAIR. — *By Landlord*. — It is a well-established rule at common law that, in the absence of any agreement to keep leased premises in repair, a landlord is under no legal obligation to his tenant to do so: *Dutton v. Gerrish*, 9 Cush. 242; *Royce v. Guggenheim*, 106 Mass. 201; *Howard v. Doolittle*, 3 Duer, 464; *Jaffe v. Harteau*, 56 N. Y. 398; S. C., 15 Am. Rep. 438; *Johnson v. Oppenheim*, 55 N. Y. 280, 289; *Loupe v. Wood*, 51 Cal. 586; *Scott v. Simons*, 54 N. H. 430; *Rogan v. Dockery*, 23 Mo. App. 313; *Deutsch v. Abeles*, 15 Id. 398; *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, 12 Id. 68; *Carstairs v. Taylor*, L. R. 6 Ex. 217; and the tenant has no remedy against the landlord for suffering the premises to get out of repair, unless the latter has agreed to keep them in repair: *Doupe v. Genin*, 45 N. Y. 119; S. C., 37 How. Pr. 1; 6 Am. Rep. 47; *McAlpin v. Powell*, 70 N. Y. 126; *Edwards v. Railroad Co.*, 98 Id. 245; *Bowee v. Hunking*, 135 Mass. 380; S. C., 46 Am. Rep. 471; *Cole v. McKey*, 66 Wis. 500; S. C., 57 Am. Rep. 293; *Joyce v. De Giverville*, 2 Mo. App. 596; *Wehrman v. Priest*, 12 Id. 577; *Brewster v. De Fremery*, 33 Cal. 341; *Weinsteins v. Harrison*, 66 Tex. 546; S. C., 1 S. W. Rep. 626; *Mullen v. Rainear*, 45 N. J. L. 520. Nor is it in the power of the tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him to do so. The tenant takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent: *Mumford v. Brown*, 6 Cow. 475; S. C., 16 Am. Dec. 440; *Robbins v. Moun*, 4 Robt. 553; *Morris v. Tillson*, 81 Ill. 607; *Clark v. Babcock*, 23 Mich. 164; *Handrahan v. O'Reagan*,

45 Iowa, 298; *Elliott v. Aiken*, 45 N. H. 30; *Withey v. Mathews*, 52 N. Y. 512; *Purcell v. English*, 86 Ind. 34; S. C., 41 Am. Rep. 255; *Lucas v. Coulter*, 104 Ind. 81; *Colbeck v. Girdlers Co.*, L. R. 1 Q. B. D. 234; and the rule has been extended to portions of the premises not expressly demised to the tenant, but which are necessary for his use or protection, — as, for instance, the common roof: *Krueger v. Ferrant*, 29 Minn. 385; S. C., 43 Am. Rep. 223; and see *Wilkinson v. Clawson*, 29 Minn. 91; *Walker v. Gilbert*, 2 Robt. 214. And where the lessee holds under a lease containing a covenant on his part to keep the premises in repair, he cannot enforce a mere verbal promise of the landlord to make repairs, since the promise merges in the written lease: *Wilson v. Deen*, 74 N. Y. 531; *Kabus v. Frost*, 18 Jones & S. 72; *Hartford etc. Steamboat Co. v. Mayor etc.*, 12 Hun, 550; S. C., 78 N. Y. 1; *Libbey v. Tolford*, 48 Me. 316; *Walker v. Gilbert*, 2 Robt. 214. Nor can the lessee avail himself of the fact that his lessor holds as trustee under the provisions of a will, which directs him to keep the demised premises in repair, although the lease in terms is made subject to the provisions of the will: *Wheeler v. Crawford*, 86 Pa. St. 327. And a mere promise by the landlord to repair, based alone upon the tenant's agreement not to abandon the demised premises before the end of his term, is without consideration, and cannot be enforced: *Eblin v. Miller*, 78 Ky. 371; *Proctor v. Keith*, 12 B. Mon. 252; and see *Speckels v. Sax*, 1 E. D. Smith, 253. The landlord may, however, bind not only himself, but the reversioner, by an express covenant to make repairs to the demised premises: *Allen v. Culver*, 3 Denio, 284; *Demarest v. Willard*, 8 Cow. 206. And it was held that the acceptance of a lease containing a covenant that the lessee will give up the demised premises to the lessor at the end of the term in as good order and condition "as the same now are or may be put into by the lessor," is a sufficient consideration for an agreement executed and delivered by the lessor contemporaneously with the lease, which refers in terms to the lease, and in which the lessor binds himself to make forthwith certain repairs upon the premises: *Vass v. Wales*, 129 Mass. 38. In some of the states the matter is regulated by statute. Thus, in Georgia, the duty of keeping demised premises in repair is on the landlord, in the absence of any covenant on the subject: *Lewis v. Chisholm*, 68 Ga. 40. So, in California, it is the duty of the landlord to repair upon notice: Cal. Civ. Code, sec. 1942; *Van Every v. Ogg*, 59 Cal. 563; and under such provisions, the failure of the landlord to repair entitles the tenant either to quit the possession or to repair at the landlord's expense: *Johnson v. Oppenheim*, 55 N. Y. 290; *St. Michael's P. E. Church v. Behrens*, 13 Daly, 548; *Coleman v. Haight*, 14 La. Ann. 564; Dak. Civ. Code, sec. 1115. Under the Dakota statute, the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, keep the premises in repair: Civ. Code, sec. 1114; but a landlord who rents the cellar and first story of a building in a store block is not bound to keep the same in repair, in the absence of an agreement in the lease, as the property leased in not "a building intended for the occupation of human beings," within the meaning of the statute: *Edmison v. Aslesen*, 27 N. W. Rep. 82 (Sup. Ct. Dak.).

Under General Covenant on the part of the landlord to repair, he is bound not to keep the premises in repair, but to put them in that condition: *Ward v. Kelcey*, 38 N. Y. 80; compare *Thomas v. Kingsland*, 12 Daly, 316. And if the premises were let for a particular purpose, he is bound, under his covenant to repair, to put them in such a state of repair as the business requires: *Myers v. Burns*, 33 Barb. 401; S. C., 35 N. Y. 269; but his covenant to repair extends only to buildings already constructed, unless pre-

vision is otherwise made in the lease: *Cornish v. Cliffe*, 3 Hurl. & C. 446; *Loader v. Kemp*, 2 Car. & P. 675. And if the tenant enters and continues in possession until the end of the term, he thereby waives any claim for damages arising from the lessor's failure to fulfill a condition of the lease that he would, at its commencement, put the premises in repair: *Chadwick v. Woodward*, 13 Abb. N. C. 441; *Williamson v. Miller*, 55 Iowa, 86; *Parker v. Palmer*, 4 Barn. & Ald. 387. But when the landlord agrees to repair before a certain day, which does not arrive until after the term begins, entry by the tenant does not operate as a waiver, and if the repairs are not made at the time agreed, the tenant may abandon the premises, and is not chargeable with rent for the time actually occupied: *Kiernan v. Germain*, 61 Miss. 498; and see *Sparks v. Bassett*, 17 Jones & S. 270. If no time is specified when the repairs shall be made, the law will presume that they are to be made in a reasonable time: *Lunn v. Gage*, 37 Ill. 19; and a notice to perform from the tenant is requisite to put the landlord in default: *Gerzebek v. Lord*, 33 N. J. L. 240; *Favrot v. Mettler*, 21 La. Ann. 220; *Norfleet v. Cromwell*, 64 N. C. 1; *Wolcott v. Sullivan*, 6 Paige, 117; *Walker v. Gilbert*, 2 Robt. 221. Thus a covenant in a lease of the upper part of a building, on the part of the lessor, to put and keep the roof in good repair, is to be construed as meaning that the lessor, whenever notified that the roof needs repairs, will cause them to be made, and does not render him liable for losses occurring from a want of repairs of which he was not notified, and had no knowledge: *Thomas v. Kingsland*, 12 Daly, 315. It has, however, been held that the lessee has an action on the lessor's covenant to repair without previous notice of want of repair, especially if the lease contains a covenant that the lessor may enter "to view and make improvements": *Hayden v. Bradley*, 6 Gray, 425; S. C., 66 Am. Dec. 421. But without notice to repair, the landlord is not liable upon his covenant to repair for injuries to a stranger in consequence of a want of repair while the latter is upon the premises by invitation of the tenant: *Ploen v. Staff*, 9 Mo. App. 309. If the landlord unreasonably neglects to make the repairs after notice to do so, the tenant may make them, and charge the expense to the landlord: *Buck v. Rogers*, 39 Ind. 222; *Westermuir v. Street*, 21 La. Ann. 714; *Diggs v. Maury*, 23 Id. 59; and see *Block v. Ebner*, 54 Ind. 544; but he is not bound to do so, and may recover as damages for the breach of covenant the value of the use of any portion of the premises during the time it is rendered untenable because of failure to make the repairs: *Hexter v. Knox*, 63 N. Y. 561; and see *Arnold v. Clark*, 13 Jones & S. 256; *Cook v. Soule*, 56 N. Y. 420. Where the lease reserves to the lessor the right to enter to make repairs, he is not liable in damages for interrupting the lessee's business, or otherwise, in the exercise of such right, unless it is shown that it was done wantonly, unskillfully, or negligently: *Turner v. McCarthy*, 4 E. D. Smith, 247; *White v. Mealis*, 5 Jones & S. 72; *Bonnecaze v. Beer*, 37 La. Ann. 531. And it is held that the right of entry to make repairs for the protection of the reversion is one of the incidents of the relation of landlord and tenant vested in the former: *Subbacher v. Dickie*, 51 How. Pr. 500; *Smith v. Kerr*, 33 Hun, 567; and see *Glickauf v. Maurer*, 75 Ill. 289; S. C., 20 Am. Rep. 238. And the entry of the landlord to repair for the benefit of the tenant is not an eviction: *Peterson v. Edmonson*, 5 Harr. (Del.) 378. If the lessor covenants to "rebuild" in case the premises demised shall be burned, he is only bound to restore them to the state in which they were when he let them, and not to rebuild any additional parts which may have been erected by the tenant: *Loader v. Kemp*, 2 Car. &

P. 375. See, as to the rule of damages for breach of covenant to rebuild, *Ganson v. Tift*, 71 N. Y. 48.

By Tenant. — There is in every lease, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it. This implied obligation is part of the contract itself, as much so as if incorporated into it by express language; and it results from the relation of landlord and tenant between the parties which the contract creates: *Halford v. Dunnett*, 7 Mees. & W. 352; *United States v. Bostwick*, 94 U. S. 66. It is not, however, an obligation resting upon the tenant to repair generally, but only to keep the premises in as good repair as he receives them, ordinary wear and tear and accidental injuries excepted: *Hughes v. Vanstone*, 24 Mo. App. 637; *Foster v. Boll*, 6 Mass. 63; *Nave v. Berry*, 22 Ala. 382; *Lynch v. Onondaga Salt Co.*, 64 Barb. 558; *Johnson v. Dizon*, 1 Daly, 178; *Eagle v. Swayze*, 2 Id. 140; *Thompson v. Amey*, 12 Ad. & E. 476; *Hitner v. Ege*, 28 Pa. St. 305; *Miller v. Shields*, 55 Ind. 71; *Stanley v. Agnew*, 12 Mees. & W. 827. Thus, in the case of buildings, a tenant from year to year is bound to keep them wind-and-water tight, in the absence of any special agreement on the subject: *Leach v. Thomas*, 7 Car. & P. 326. He is bound to restore, for instance, doors and windows, broken during his occupancy, but is not bound to make substantial and lasting repairs, such as putting on a new roof: *Deutsch v. Abeles*, 15 Mo. App. 398; nor is he bound to rebuild, when the premises have accidentally become ruinous or are destroyed, unless by express agreement: *Anworth v. Johnson*, 5 Car. & P. 239; *White v. Nicholson*, 4 Man. & G. 95; S. C., 4 Scott N. R. 707; *Eagle v. Swayze*, 2 Daly, 140. But it is the duty of a farm tenant to make all needed current repairs on the fences, in the absence of a contrary covenant. The implied duty to do so grows out of his occupancy of the land: *Cheetham v. Hampson*, 4 Term Rep. 318; *Blood v. Spaulding*, 57 Vt. 422; *Moulton v. Moore*, 56 Id. 700; *Fenton v. Montgomery*, 19 Mo. App. 156.

The Tenant's Liability to Repair is usually fixed by express covenant in the lease, and when this is so, no covenant or promise as to repairs can be implied: See *Standen v. Christmas*, 10 Q. B. 135; *Merrill v. Frame*, 4 Taunt. 329; *Messent v. Reynolds*, 3 Com. B. 194. A general covenant on his part to repair is satisfied, if the premises are kept in substantial repair: *Harris v. Jones*, 1 Moo. & R. 173; such covenant merely binds him to see that the tenement does not suffer greater injury than the usual operations of nature will cause to a building of its age and condition: *Stanley v. Twogood*, 3 Bing. N. C. 4; *Gutteridge v. Munyard*, 7 Car. & P. 129; the covenant is to be construed as having reference to the condition of the premises at the time when the covenant begins to operate: *Walker v. Hatton*, 10 Mees. & W. 258; and see *Mantz v. Goring*, 4 Bing. N. C. 451; *Ardesco Oil Co. v. Richardson*, 63 Pa. St. 162; *Harris v. Collourn*, 3 Harr. (Del.) 338; *White v. Railroad Co.*, 24 N. Y. 98. But the tenant may bind himself to any extent he pleases by express covenants in his lease: See *Beach v. Crain*, 2 Id. 86; and if he enters into an express and unconditional covenant to repair and keep in repair, or to surrender the premises in good repair, he is liable for the destruction of buildings not rebuilt by him, though the destruction may have occurred by fire or other accident: *Phillips v. Stevens*, 16 Mass. 238; *Tilden v. Tilden*, 13 Gray, 103; *Ross v. Overton*, 3 Call, 309; S. C., 2 Am. Dec. 552; *Scott v. Scott*, 18 Gratt. 166; *Abby v. Billrpe*, 35 Miss. 618; S. C., 72 Am. Dec. 143; *McIntosh v. Loun*, 49 Barb. 550; *Lockrow v. Horgan*, 58 N. Y. 635; *Schmidt v. Pettit*, 1 McAr. 179; *Ely v. Ely*, 80 Ill. 532; *Hoy v. Holt*, 91 Pa. St. 88; S. C., 36 Am. Rep. 659; and such loss does not even stop the rent until the building is replaced: *Harris v.*

Heackman, 62 Iowa, 411; *Ely v. Ely*, 80 Ill. 532; *Loft v. Dennis*, 1 El. & E. 474; *Davis v. Alden*, 2 Gray, 309; and under such covenant the tenant may be compelled to rebuild in case of total destruction by fire, even though, subsequent to the execution of the lease, the fire limits of the city in which the property is situated are so extended that in rebuilding he must construct a more expensive building than the one burned: *David v. Ryan*, 47 Iowa, 642; *Harris v. Heackman*, 62 Id. 411; but see, *contra*, *Cordes v. Miller*, 39 Mich. 581; S. C., 33 Am. Rep. 430. In some of the states a statutory provision requires that the landlord shall repair, or rent shall cease, whenever buildings are injured by fire without the fault of the tenant: *Dorr v. Harkness*, 10 Atl. Rep. 400 (N. J.); and see *Lampher v. Glenn*, 33 N. W. Rep. 10 (Minn.). But in the absence of any such provision, if the tenant desires to protect himself against damages by the elements, etc., he must see that they are excepted from the operation of his covenant: Id. And it is held that "damages by the elements," which are ordinarily excepted from a lessee's covenant to keep in repair, cover destruction by fire occurring without fault or negligence on the part of the lessee: *Van Wormer v. Crane*, 51 Mich. 363; S. C., 47 Am. Rep. 582, citing the principal case, but disapproving the construction given to the exception there under consideration, and dissenting from the reasoning relied upon to support the rule adopted by the court. So it is held that a stipulation in a lease to surrender the premises at the expiration of the term "in as good order and condition as the same now are, reasonable use and wear and tear excepted," is but the expression of the implied obligation resting upon the tenant, and not a covenant to repair or rebuild, and does not impose the liability to repair or restore in case of injury or destruction by the elements or accident: *Warren v. Wagner*, 75 Ala. 188; S. C., 51 Am. Rep. 446; and to the same effect, see *Nave v. Berry*, 22 Ala. 382; *Howeth v. Anderson*, 25 Tex. 557; S. C., 78 Am. Dec. 538; *Miller v. Morris*, 55 Tex. 412; S. C., 40 Am. Rep. 814; *Warner v. Hitchins*, 5 Barb. 666; *Levey v. Dyess*, 51 Miss. 501.

But where the lessee of a room in a block covenanted to keep the premises in good and constant repair, the lease to become void, and the rent to cease, if the premises were destroyed, and the owners of an adjoining vacant lot thereafter erected a building on the same, whereby the demised premises were to a great extent cut off from light and ventilation, and were rendered damp and unhealthy, but were capable of being made tenantable by repairs, it was held that the lessee was not authorized to abandon the lease, and refuse payment of the accruing rent: *Hilliard v. Gas Coal Co.*, 41 Ohio St. 662. Having covenanted to pay rent, except only in the event of the destruction of the premises, the lessee was bound by the agreement, notwithstanding the subsequent change in the condition of the leased premises by the erection of the adjoining building: Id.; *Linn v. Ross*, 10 Ohio, 412; *Brown v. Curran*, 53 How. Pr. 303. If there be no covenants to repair, and the lease is of such a character that the lessee has no interest in the land, as where it is only for certain rooms in a building, the destruction of the building terminates the lease, and the relation of landlord and tenant, and bars an action for any rent subsequent to the destruction of the building: *Stockwell v. Hunter*, 11 Met. 448; *Ainsworth v. Ritt*, 38 Cal. 89; *Graves v. Berdan*, 26 N. Y. 498; *McMillan v. Solomon*, 42 Ala. 356; *Shawmut Nat. Bank v. Boston*, 118 Mass. 125. A covenant in a lease to "maintain the buildings" binds the lessee at all times; and an action will lie by the lessor for any neglect, although before the termination of the lease: *Buck v. Pike*, 27 Vt. 529; *Luzmore v. Robson*, 1 Barn. & Ald. 584. And where a lease contains a covenant to make repairs, and also

one to surrender the premises in good condition, "damages by the elements excepted," it is held that the first covenant is not qualified by the second, and the lessor may recover damages for the omission, on the part of the lessee, to repair damages caused by the elements: *Kling v. Dress*, 5 Robt. 521. A covenant to repair generally, and a covenant to repair within a specified time after notice, are generally held to be distinct and independent covenants: *Roe v. Paine*, 2 Camp. 520; *Doe v. Meux*, 4 Barn. & C. 606; *Few v. Perkins*, L. R. 2 Ex. 92; *Baylis v. Le Gros*, 4 Com. B., N. S., 513. But if one immediately follows the other in such a way that they must be joined to make the sentence complete, they are construed as one entire covenant, the latter part respecting notice being held to qualify the former: *Horsefall v. Testar*, 7 Taunt. 385; as where the covenant is to repair at all times, as often as needed, and at furthest within three months after notice: *Id.*; *Woodfall on Landlord and Tenant*, 566. A covenant "to keep in repair," and a covenant "to keep the premises in as good repair as they now are," are identically the same covenants, and the former imposes upon the tenant the obligation to keep the premises in as good repair as when the agreement was made: *Stultz v. Locke*, 47 Md. 562; *Middlekauff v. Smith*, 1 Id. 329.

A covenant "forthwith" to put premises into repair is to be reasonably construed, and is not limited to any specific time: See *Doe v. Sutton*, 9 Car. & P. 706. The word "forthwith" means with all reasonable celerity: *Burgess v. Boctefeur*, 7 Man. & G. 494; but does not mean "immediately": *Roberts v. Brett*, 11 H. L. Cas. 337. A tenant cannot be held liable for a breach of a covenant to repair, committed before the execution of the lease, but after he had gone into possession: *Shaw v. Kay*, 1 Ex. 412. But where, in an agreement under seal for a lease, the defendant covenanted that he would from time to time, during the term to be granted, keep the premises in repair, etc., and entered upon and occupied the premises until the expiration of the term agreed to be granted, it was held that he was liable to repair according to the covenant, although no lease had ever been executed to him pursuant to the agreement: *Pistor v. Cater*, 9 Mees. & W. 315. So if a tenant holds over, after the expiration of a written lease containing covenants for repairs, he is presumed to hold under such covenants in the former lease, and is still liable to repair; and if the premises are burned down by accidental fire, or otherwise destroyed, he is bound to rebuild them: *Digby v. Atkinson*, 4 Camp. 275; *Torriano v. Young*, 6 Car. & P. 8; *Beale v. Sanders*, 3 Bing. N. C. 850. And if the tenant covenants to keep the premises in repair, and also covenants to insure them for a specific amount against fire, and they are burned down, the tenant's liability on the former covenant is not limited to the amount to be insured under the latter covenant: *Digby v. Atkinson*, 4 Camp. 275. A covenant to yield up in repair at the end of a term runs with the land, and binds an assignee, though not named: *Martyn v. Clue*, 18 Q. B. 661; *Bullock v. Dommitt*, 6 Term Rep. 650. Where the lessee covenants to repair, "casualties by fire and tempest excepted," it seems that the lessor is not bound to repair or rebuild, in either of the excepted cases, unless there is in the lease an express covenant by him to that effect: *Weigall v. Waters*, 6 Term Rep. 488.

Liability for Injuries from Failure to Repair Demise. Premises: See, on this subject, *City of Lowell v. Spaulding*, 50 Am. Dec. 775, and note 776; *Hayden v. Bradley*, 66 Id. 421. The general rule is, that the occupant, and not the owner, as such, is responsible for injuries received in consequence of a failure to keep the premises occupied in repair: *Chicago v. O'Brennan*, 65 Ill. 160; *Gridley v. City of Bloomington*, 68 Id. 47; *Fisher v. Thibell*, 21 Mich.

1; *Cleveland Co-operative Stove Co. v. Wheeler*, 14 Ill. App. 112; *City of Boston v. Gray*, 10 East. Rep. 339 (Mass.). To this rule there are two well-recognized exceptions: 1. Where the landlord by express agreement with the tenant has agreed to keep the premises in repair; and 2. Where the premises are let with a nuisance upon them, by means of which the injury complained of is received: *Gridley v. City of Bloomington*, 68 Ill. 47; *Union Brass Mfg. Co. v. Lindsay*, 10 Ill. App. 583. Thus in the absence of any contract obligation of a landlord to keep rented premises in repair, he cannot be held liable for an injury to adjoining premises occasioned by the leaking of a water-pipe which was in good repair when the tenant took possession: *Deutsch v. Abeles*, 15 Mo. App. 398. And generally speaking, if the premises are in good repair, and no nuisance is upon them when demised, but they afterward become ruinous and dangerous, the landlord is not responsible therefor, either to the occupant or the public, unless he has expressly agreed to repair, or has renewed the lease after the need of repair has shown itself: *Clancy v. Byrne*, 56 N. Y. 129; he cannot be held responsible for an after-occurring nuisance, unless in some manner he is in fault for its creation or continuance: *Wolf v. Kilpatrick*, 101 N. Y. 146; S. C., 54 Am. Rep. 672. But according to many of the decisions, he may be held liable for a nuisance which was a necessary, contemplated, or probable result of the use of the thing leased for the purposes for which it was leased: See *Durant v. Palmer*, 29 N. J. L. 544; *House v. Metcalf*, 27 Conn. 631; *Jessen v. Sweigert*, 66 Cal. 182; *Kalis v. Shattuck*, 69 Id. 593; *Swords v. Edgar*, 59 N. Y. 28; *Nelson v. Liverpool Brewing Co.*, L. R. 2 C. P. 311; *McCallum v. Hutchinson*, 7 U. C. C. P. 508. And one who creates a nuisance on his own premises cannot escape liability for its continuance by demising the premises whereon the nuisance is, and it is held that such liability will exist although the tenant by the demise stipulates to keep the premises in repair: *Ingwersen v. Rankin*, 47 N. J. L. 18; S. C., 54 Am. Rep. 109. But compare *Leonard v. Storer*, 115 Mass. 86; S. C., 15 Am. Rep. 76; *Pretty v. Brickmore*, L. R. 8 C. P. 401; *Goennell v. Eamer*, Id. 658.

AMONG RECENT DECISIONS RELATIVE TO RESPECTIVE LIABILITY OF LANDLORD AND TENANT for injuries arising from failure to repair, are the following: In the absence of any covenant in the lease itself, as to the fitness of the leased premises for occupation as a dwelling, no covenant of the lessor can be implied on the subject, and he incurs no responsibility in such cases, except such as arises from absolute *delictum* on his part: *Coulson v. Whiting*, 14 Abb. N. C. 60; *Sutphen v. Seebas*, 14 Id. 67; *Franklin v. Brown*, 21 Jones & S. 474. Thus, if he knew before, or at the time of the letting, that the premises were, by reason of some latent defects, unfit for occupation in the use for which they were hired, and he failed to disclose these defects, he would be guilty of negligence: *Edwards v. New York etc. R. R. Co.*, 98 N. Y. 245; S. C., 50 Am. Rep. 659; *Albert v. State*, 10 East. Rep. 626 (Md.); *Cole v. McKey*, 66 Wis. 500; S. C., 57 Am. Rep. 293; and he would also be liable if the defect arose from his own wrongful act: *Rhineland v. Seaman*, 13 Abb. N. C. 455; *Chadwick v. Woodward*, 13 Id. 441; and see *Cesar v. Karutz*, 60 N. Y. 229. So the lessee of part of a building is not bound to make repairs of a general character, and if the lessor fails to make them and the building falls, he is liable to the lessee, even though the latter, induced by the former's promise to repair and to pay for damages, remained knowing the premises to be unsafe: *Bold v. O'Brien*, 12 Daly, 160; and see *St. Michael's P. M. Church v. Behrens*, 13 Id. 549. In a recent case in Massachusetts, it was held that the lessor of premises abutting upon the street is liable to

strangers who suffer injury from the dangerous condition of a coal-hole in the sidewalk appurtenant to the premises, although they are let to and occupied by a tenant at will, if the defect existed at the time of the letting, and the lessee was not bound by agreement with the lessor to put the premises in proper condition: *Dalay v. Rice*, 36 Alb. L. J. 304; and compare *Jennings v. Van Schaick*, 13 Daly, 438; *Wolf v. Kilpatrick*, 101 N. Y. 146; S. C., 54 Am. Rep. 672.

Where the lessee covenanted to make certain repairs, and similar repairs had been previously ordered by the board of health, it was held that the lessor, having made these repairs as ordered, was entitled to reimbursement from the lessee: *Hull v. Burns*, 17 Abb. N. C. 317.

If it is sought to hold the landlord liable for injuries from want of repair, in a case where the tenant, by express agreement, was to make all necessary repairs, the burden of proof is upon the plaintiff to show that the defect complained of existed at the date of the lease: *Union Brass Mfg. Co. v. Lindsey*, 10 Ill. App. 583.

THE PRINCIPAL CASE IS CITED to the point that the expression "act of God" excludes the idea of human agency, and if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to have been the act of God, but must be regarded as the act of man, in *Chidester v. Consolidated Dutch Co.*, 59 Cal. 202; it is cited to the point that in the case of the act of God, or inevitable accident, a party is not excused when the injury or damage might have been avoided by the exercise of due care and prudence on his part, in *Odd Fellows etc. Association v. James*, 63 Id. 606; and to the point that the fact that a natural cause contributes with the unlawful act of a person to inflict an injury does not relieve him from liability to the person injured, in *Salisbury v. Herchenroder*, 106 Mass. 461.

PEOPLE v. GARNETT.

[35 CALIFORNIA, 470.]

CHEATS AND FRAUDS, to what extent indictable at common law.

TO JUSTIFY CONVICTION FOR STATUTORY OFFENSE OF SELLING LAND TWICE, it is necessary to charge in the indictment, and prove at the trial, the first and second sales, barter, or disposal of the land, as specified in the statute; and that such second sale, etc., was for a valuable consideration, and was made fraudulently, — that is, with intent to defraud either the first or second purchaser.

SAME.—WHEN SECOND SALE NOT FRAUDULENT.—In such case, the second sale is not fraudulent within the meaning of the statute, if made to parties at their request, and after being fully informed by the grantor of the fact and the tenor of the first sale.

INDICTMENT for a statutory offense in the following language:
 "The said James Garnett is accused by the grand jury of the county of Sacramento, California, by this indictment, . . . of the crime of selling land twice, committed as follows: The said James Garnett [stating time and place] did bargain and sell to one John Barrett those certain lots of land [giving loca-

tion and description]; and that the said James Garnett did afterwards, to wit, on the fifteenth day of April, of the year aforesaid, the above-described lots, for a valuable consideration, feloniously, knowingly, and fraudulently again sell and dispose of to William Muldrow, A. G. Waterhouse, and J. C. Babcock, there being contrary to the form of the statute in such case made and provided," etc. The other facts appear in the opinion. The defendant appealed.

P. Dunlap and J. W. Coffroth, for the appellant.

So Hamilton, attorney-general, for the people.

By Court, SANDERSON, J. The indictment in this case was found under section 132 of the statute in relation to crimes and punishments. That section is found in the twelfth subdivision of the statute which treats of "offenses committed by cheats, swindlers, and other fraudulent persons," and reads as follows: "Any person or persons after once selling, bartering, or disposing of any tract or tracts of land, town lot or lots, who shall again knowingly and fraudulently sell, barter, or dispose of the same tract or tracts of land, town lot or lots, or any part thereof, or shall knowingly and fraudulently execute any bond or agreement to sell, or barter, or dispose of the same land, or lot or lots, or any part thereof, to any other person or persons, for a valuable consideration, every such offender, upon conviction thereof, shall be punished by imprisonment in the state prison not less than one nor more than ten years."

Cheats which are leveled against public justice, as judicial acts done without authority in the name of another, and frauds which affect the government and the public at large, as rendering false accounts by persons in official positions, writing false news, selling unwholesome provisions, and using false weights and measures, were indictable at common law. But cheats and frauds not calculated to affect the public in any way, and committed in the course of private transactions, and affecting only the parties concerned, as by lying and false representations, were not indictable at common law: 2 Russell on Crimes, 275 et seq. This limited scope of the common law proved inadequate to the protection of society against cheats, swindlers, and other fraudulent persons. So various statutes were from time to time passed, as occasion required, to counteract and hold in check the fraudulent inventions and contrivances of that class of persons. Accordingly the statute of 13

Eliz., c. 5, entitled "An act against fraudulent conveyances, deeds, gifts, alienations, etc.," was passed, and it was thereby made a criminal offense to convey lands, tenements, hereditaments, goods, or chattels, and the like, with intent to hinder and delay creditors and others of their lawful actions, debts, damages, penalties, and the like. This statute of 13 Elizabeth is substantially embodied in section 129 of the statute of this state in relation to crimes and punishments. Next came the statute of 27 Eliz., c. 4, which made it a criminal offense for any person to sell or convey land, and the like, with intent to defraud previous or subsequent purchasers. This latter statute is substantially incorporated in section 132 of the statute of this state in relation to crimes and punishments, which is the section under which the indictment in this case was found: 2 Russell on Crimes, 314 et seq.

We have thus referred to the origin of our statute with a view to its interpretation, its being said that its meaning is obscure, and for the same purpose we also refer to a statute of the state of Ohio upon the same subject, which is in the following words:—

"That if any person or persons shall knowingly sell or convey any tract of land without having a title to the same, either in law or equity, by descent, devise, or evidence, by a written contract, or deed of conveyance, with intent to defraud the purchaser, every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be imprisoned in the penitentiary, and kept at hard labor, not more than seven years nor less than one year": 1 Ohio R. S., 415, sec. 33.

Whatever of obscurity there may be as to the true meaning of the statute of this state is due to the fact that it does not, like the statute of 27 Eliz., c. 4, and the statute of Ohio, designate the person to be injured by the fraud, and therefore leaves the question open to speculation. The statute of 27 Elizabeth proceeds upon the theory that either of the purchasers may be defrauded by the second sale, while the statute of Ohio proceeds upon the theory that a purchaser from one who has no title is the only person who can be injured by the transaction. The English statute proceeds upon the true theory, wherever registry laws like that of this state are in force. If the second purchaser purchases in good faith, and for a valuable consideration, and puts his deed on record before the first deed is recorded, he will hold the land as against the first purchaser

(Registry Act, sec. 26), and cannot, therefore, be defrauded by the transaction. In that case the first purchaser will have become the victim of the fraud.

On the other hand, if the first deed be first recorded, the second purchaser becomes the victim. From the nature of the case, then, only one of two parties can be injured by the transaction, but it may be either of them, according to circumstances. The statute of this state adopts the theory of the English statute, but not its precision, while the statute of Ohio would seem to fall short of providing for all of the evil consequences which may follow upon the performance of the act which is prohibited.

The only persons who could, under any circumstances, have been injured by the alleged fraudulent act of the defendant, were Barrett, who was the first purchaser, and Muldrow, Waterhouse, and Babcock, who were the second purchasers.

To constitute the offense charged in this indictment, it must appear that there was,—1. A sale and conveyance to Barrett; 2. A sale and conveyance to Muldrow, Waterhouse, and Babcock, for a valuable consideration; 3. That the latter sale was made fraudulently, that is to say, with intent to defraud either Barrett, or Muldrow, Waterhouse, and Babcock. The fraudulent character of the transaction must not only be averred, but proved; and it is claimed on the part of the defendant that the testimony not only fails to show a fraudulent intent, but emphatically negatives the idea that there was any. The point is well taken. There is no conflict whatever in the evidence. It shows that the defendant sold and conveyed, for a valuable consideration, to Barrett. There is no pretense but that the deed was sufficient in law, and passed the entire interest of the defendant in the land to Barrett. Barrett could not, therefore, be defrauded by a subsequent conveyance, unless first recorded. Barrett's conveyance was duly recorded, and the conveyance to Muldrow, Waterhouse, and Barrett was not recorded at any time, or at least had not been up to the time of the trial. When Muldrow, Waterhouse, and Babcock proposed to purchase, they were told by the defendant, and otherwise informed, according to their own testimony, that he had sold and conveyed to Barrett, and the deed was of record. No deceit or fraud was practiced by the defendant, either by misrepresentation or suppression of facts. What advantage or benefit Muldrow, Waterhouse, and Babcock expected to derive from the purchase, it is impossible to

conjecture. But be that as it may, it is certain that, under the circumstances, they were not and could not be damaged or injured in consequence of their purchase, for they purchased with full knowledge of all the facts. There is not, in our judgment, the slightest ground for declaring the transaction fraudulent on the part of the defendant. If there was any fraud designed, it must have been on the part of Muldrow, Waterhouse, and Babcock. So far as the defendant was concerned, he seems to have acted not only in the utmost good faith, but with unusual prudence and caution, for he refused to do a harmless act, until advised by counsel whom he consulted, that he could do so without any violation of the law.

The instructions of the court left the law as well as the facts to the jury, and it is quite evident that the jury did not correctly interpret the statute.

Judgment reversed, and *remittitur* ordered to issue forthwith.

RHODES, J., expressed no opinion.

CHARGING STATUTORY OFFENSE IN INDICTMENT, WHAT IS NECESSARY? See *State v. Campbell*, 94 Am. Dec. 251, and extended note thereto.

FRANKLIN v. MERIDA.

[85 CALIFORNIA, 568.]

LAW DOES NOT FAVOR DOCTRINE OF ESTOPPEL, which may be said to be founded upon the adage that "the truth is not to be spoken at all times"; and the doctrine is never to be applied, except where to allow the truth to be told would consummate a wrong to one party or enable the other to secure an unfair advantage.

ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE. — Where A, being in possession of land, delivers the possession to B, upon his request, and upon his promise to return it, with or without rent, at a specified time, or at the will of A, B cannot be allowed, while still retaining the possession, to dispute A's title; but the rule is otherwise if B is in possession and takes a lease from A, since the latter parts with nothing, and the former has obtained nothing by the transaction.

DOCTRINE OF ESTOPPEL, AS BETWEEN LANDLORD AND TENANT, IS DESIGNED as a shield for the protection of the former, and not as a sword for the destruction of the latter.

BARE POSSESSION BY TENANT OF DEMISED LAND AT TIME LEASE IS GIVEN is sufficient to take the case out of the operation of the general rule, that the tenant cannot, before surrendering possession, dispute the landlord's title; and there need not be, in addition to the possession of the

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tenant, any force, fraud, misrepresentation, or mistake induced by the landlord, beyond what is implied in the transaction itself, by which the tenant was induced to take the lease.

ACTION of ejectment, commenced March 10, 1865. The plaintiff counted upon a title in fee in him, and an ouster by the defendants, alleged to have been made November 21, 1864. The answer put in issue all the averments of the complaint except the possession of the defendants, which was justified; and the statute of limitations was also pleaded in bar. On the trial, the plaintiff deraigned title to the demanded premises from one Jesse George, who conveyed the same to Brooks by deed, dated December 13, 1854, and to the title of the latter the plaintiff succeeded through a series of mesne conveyances, which title vested in him December 18, 1862. The evidence tended to prove that the plaintiff's title was founded on a purely possessory claim to the premises, made by said George prior to the year 1853; that prior to the conveyance from George to Brooks, the defendant Merida was in possession of said premises as the agent of George, and had been thereafter continuously in possession thereof until the commencement of this suit; that on the 5th of February, 1855, the defendant Merida, at the request of Brooks, and induced thereto by his representations that he (Brooks) and one Whitcomb had succeeded by deed to all the rights of said George in said property, and were the owners thereof, joined with Brooks and Whitcomb in the execution of a lease, in which the property was described, for the term of six months, at the rent of one dollar; the said Merida agreeing to occupy the same, and to cultivate some portion thereof during the term, and also to allow the parties to the lease, at any time during the term, "to use, occupy, or sell any portion of said land" not in actual use and improvement by the said parties. At the time of the execution of this instrument, said Brooks and Whitcomb had succeeded by deed to whatever title passed by the conveyance above mentioned of December 13, 1854. The instrument was not admitted in evidence, because of certain defects in proof of its due execution, but was permitted to be read to the jury in connection with an instrument written on the back thereof, dated June 15, 1859, as containing a description of the premises therein referred to. The last-mentioned instrument was executed by the defendant Merida, upon the request of Lumley Franklin and said Whitcomb, who, at the time of its execution, were the succes-

sors to the title which passed by the said conveyance of December 13, 1854, to wit: "I, Ephraim Merida, hereby agree to pay to Lumley Franklin and Moses Whitcomb one dollar per month rent for the lands I occupy for them, as above described, until such period as they may require the same," — dated June 15, 1859, and signed with Merida's mark. Merida never paid rent to any one; and there was testimony tending to prove, on behalf of the defendants, that said George had, in 1853 and prior thereto, claimed and resided upon said premises, Merida at the same time residing thereon with him; but that some time during said year, he abandoned his possession and possessory claim thereto in favor of Merida, leaving the latter in possession thereof; that the defendants, other than Merida, claimed under conveyances to them from Merida. The jury found a verdict in favor of the plaintiff; and the defendants appealed from the judgment, and from an order denying their motion for a new trial.

Thomas Campbell and Charles Wittram, for the appellants.

C. H. Parker, for the respondent.

By Court, SANDERSON, J. In *Tewksbury v. Magraff*, 33 Cal. 237, we had occasion to consider the principal question involved in this case. In that case, among the exceptions to the general rule that a tenant cannot dispute his landlord's title, we classed the case where the tenant did not enter into possession under the landlord's title, but was in possession at the time he took the lease; and in support of that proposition, we argued, in effect, that the law does not favor estoppels, for their effect is to prevent the party against whom they are invoked from proving the truth of the matter, to ascertain which, as a general proposition, is the great end of judicial inquiry. The doctrine of estoppel may be said to be founded upon the adage that "the truth is not to be spoken at all times," which is not less a rule of law than of ethics. The doctrine is a harsh one, and is never to be applied except where to allow the truth to be told would consummate a wrong to the one party, or enable the other to secure an unfair advantage. If A, being in possession of land, deliver the possession to B, upon his request, and upon his promise to return it, with or without rent, at a specified time, or at the will of A, B cannot be allowed, while still retaining possession, to dispute A's title, because to allow him to do so would be to allow him to work a wrong

against A, by depriving him of the advantage which his possession afforded him, and with which he would not have parted but for the promise of B that he would hold it for him, and in his place and stead. But the maxim, *Cessante ratione legis, cessat ipsa lex*, must not be overlooked. "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." If B is in possession, and takes a lease from A, the latter parts with nothing, and the former has obtained nothing by the transaction. If, however, either has gained anything, it is A. He has gained rent, and in the event of a controversy, a *prima facie* case, as against B, without proof of title, while B's case is weakened by so much as a *prima facie* case is worth. A may have gained more, for he may have severed an adverse possession, and stayed the running of the statute of limitations, for there can be no adverse possession while the lease subsists, or until there has been an open repudiation and disavowal of the tenancy by B. A's right to sue for possession is postponed, it is true. In that respect only is his relation to the property affected by the transaction, except beneficially; but for the possession, which he might have obtained, the rent promised by B is a legal equivalent. Having thus obtained no advantage over A by the transaction, why should B be estopped from showing precisely what he would have been permitted to show had the transaction never occurred? If A is thus in no worse plight than he was before the transaction, upon what principle in law or ethics can the truth be kept back? Upon what rational ground, either in an action upon the lease for rent, or in an action for the possession, should B be denied the right to show that A had no title, and therefore no right to the rent or possession? if B has promised to pay rent, or hold the possession for A, he having no title, where is the consideration for B's promise? Suppose the title is in C; B is then legally bound to pay the value of the use and occupation to C, and surrender to C, notwithstanding the lease from A. If, then, he cannot be allowed to dispute A's title, B can be legally made to pay rent to A, and the value of the use and occupation to C. The doctrine of estoppel between landlord and tenant was never designed to work such a result. It was designed merely as a shield for the protection of the landlord, and not as a sword for the destruction of the tenant.

It may be said that the taking of the lease by B is a misrepresentation of his own relation to the land, and calculated

to lull A into security, and induce him to neglect the prosecution of his rights, to his prejudice in some possible way. If so, by parity of reason, the giving a lease is a misrepresentation by A as to the title, tending directly to the prejudice of B, and if the account of the latter is to be charged with misrepresentation in receiving, the account of the former must, by parity of reason, be charged with misrepresentation in giving, the lease, which so far results in a balance, and still leaves the parties upon equal terms, to maintain which is the principal object of the estoppel.

And this brings us to the precise point of difference between us and the learned counsel for the respondent, whether the bare possession of the tenant at the time the lease is given and taken is sufficient to take the case out of the operation of the general rule, that the tenant cannot dispute the landlord's title, or whether there must be, in addition to the possession of the tenant, some force, fraud, misrepresentation, or mistake, induced by the landlord, beyond what is implied in the transaction itself, by which the tenant was influenced to take the lease. The latter view is maintained by counsel, while in *Tewksbury v. Magraff*, 33 Cal. 237, we declared the former.

Counsel does not claim that force, fraud, misrepresentation, etc., are not of themselves, irrespective of the fact of possession, sufficient to take the case out of the operation of the general rule. If they are, and of that there can be no doubt, it follows that on the score of principle the fact of possession is a false quantity for all the purposes of the question. If the bare possession of the tenant is not enough, and force, fraud, misrepresentation, and the like are of themselves enough to take the case out of the operation of the general rule, obviously the fact of possession is then wholly immaterial and constitutes no quantity in the problem to be solved. So on the score of logic, the argument, if it proves anything, proves too much.

But it is said that *Tewksbury v. Magraff*, *supra*, goes further than any previous case has gone, and that it cannot be maintained upon authority. That there are cases where it has been held that the bare possession of the tenant at the letting does not relieve him from the estoppel cannot be denied; nor can it be denied, as we shall presently see, that there are cases the other way. The latter, in our judgment, accord with the reason upon which, as we have seen, the estoppel is founded, but the former do not.

Of the cases which declare a doctrine contrary to the one

entertained by us, there are two classes: 1. Those in which the facts presented the dry question whether the bare possession of the tenant at the letting relieves him from the estoppel: and 2. Those in which the dry question was not presented by the facts, and the doctrine was announced merely in the course of discussion. The latter are entitled to no consideration as precedents. For the former only can that distinction be claimed. Of them only two have been called to our attention in which the decision turned upon a bare possession by the tenant at the time of the letting: *McConnell v. Bowdry*, 4 T. B. Mon. 392; and *Jackson v. Ayres*, 14 Johns. 224. In neither case was the reason upon which the estoppel is founded considered or applied. In each the court merely stated what it considered to be the rule, and the latter case, as the report shows, was submitted without argument. Such cases are far from satisfactory, and are not to be received as conclusive of the law. The remaining cases upon which the respondent relies are entirely consistent with the rule announced by us in *Tewksbury v. Magraff*, *supra*.

In *Hall v. Butler*, 10 Ad. & E. 205, N., having no title to certain premises, let them by parol, and received rent. Afterwards another claimant, B., demanded the rent; and N., being satisfied with B.'s title, informed his tenant, in B.'s presence, that he had given up the premises to B., who was now the landlord, and that the rent was thenceforth to be paid to B. The tenant acquiesced, and when B. demanded the next quarter's rent, paid part of it on account. Lord Chief Justice Denman, Mr. Justice Littledale, and Mr. Justice Patterson, all delivered opinions to the effect that the tenant was estopped, but put their conclusions upon somewhat different grounds. Lord Denman put his judgment upon two grounds: 1. That N. was to be considered as the agent of B., and therefore that the entry of the tenant was under B.'s title; and 2. That there was a fresh demise by B., unaccompanied by any misrepresentation as to the title by B. In this latter ground Lord Denman implied merely that the possession of the tenant of itself made no difference in the result. Mr. Justice Patterson, however, recognized the contrary doctrine. He said: "There is a distinction between disputing the title of one who has actually let the party into possession, and of one who afterwards claims to be entitled. In the latter case the tenant may generally dispute it by showing title in another." He then adds: "I am not sure that it [the transaction between

N. and the tenant] may not be considered as an original taking from B. himself; for N. treats himself as the agent of B. who adopts the demise." This common ground must be considered as the ground upon which the judgment in the case rests, in which view the case is entirely consistent with the rule of this court.

Ingraham v. Baldwin, 9 N. Y. 45, was a case where the tenant entered under the lease, and the landlord afterward conveyed to the plaintiff, to whom the tenant then attorned; and it was held that the tenant could not dispute the title of the plaintiff. Instead of being at war with *Tewksbury v. Magraff*, *supra*, this case is entirely consistent with it. We there held that in such a case the tenant could dispute only the derivative title. By so doing he does not deny the title of his landlord, but merely that the plaintiff has become the grantee of his landlord. But beyond that he cannot go, for to do so would be to dispute the title under which he entered.

The other cases are where extrinsic misrepresentation and the like, on the part of the landlord, accompanied the possession of the tenant at the letting, and where it was held that the tenant was not estopped. They are: *Hall v. Benner*, 1 Penr. & W. 402 [21 Am. Dec. 394]; *Hamilton v. Marsden*, 6 Dinn. 45; *Brown v. Dysinger*, 1 Rawle, 409; *Miller v. McBrier*, 14 Serg. & R. 385; *Swift v. Dean*, 11 Vt. 325 [34 Am. Dec. 693]; and *Shultz v. Elliott*, 11 Humph. 186. Of them it is sufficient to say that they are not authority upon the question in hand. They establish the proposition that a tenant who was in possession at the time he took his lease, and who was induced to take it by unfair means, may dispute his landlord's title,—a proposition which no one disputes. Because they do that, however, they cannot be taken as negatively establishing the proposition that the tenant cannot dispute the title of his landlord solely upon the ground that he was in possession when he took his lease. They cannot be considered as implying such a proposition; but even if they did, so important a question is not to be so decided.

We now come to those cases by which, as we consider, the rule in *Tewksbury v. Magraff*, *supra*, is sustained. *Chettle v. Pound*, 1 Ld. Raym. 746, was an action of debt for rent. Upon *nil debet* pleaded, the plaintiff gave in evidence a note in writing, by which the defendant had agreed to hold for one year, rendering rent of fifteen pounds sterling. The plaintiff was grantee of a reversion expectant upon an estate for life, and

the tenant for life was dead at the time the note was given. The grant to the plaintiff was made forty years before, and he had never been in possession. The defendant offered to prove a grant of the reversion prior to that of the plaintiff, and thus show that the plaintiff had no title at the time the note in writing was given, and it was ruled by Mr. Chief Justice Holt, that the defendant could do so because the plaintiff had never been in possession; but if he had, that then the defendant could not have given the prior grant in evidence without having been evicted. There was no pretense that the note in writing, by which the defendant had agreed to hold for the plaintiff, had been obtained by any unfair means not implied in the transaction itself, and the case turned wholly upon the bare fact that the defendant did not receive the possession from the plaintiff.

Rogers v. Pitcher, 6 Taunt. 202, was replevin for property distrained for rent. The plaintiff was in possession, and the defendant obtained a judgment and *eligit* against a moiety of the premises, and thereafter the plaintiff had paid rent for such moiety. The defendant, on whom the issue of tenancy lay, proved the payment of rent, and rested. The plaintiff proposed to answer it by showing that the defendant was not, at the time the rent was paid, or then, legally entitled to the rent. To which the defendant objected upon the ground that by the payment of the rent the plaintiff had acknowledged the defendant as her landlord, and was now estopped from contesting his title. It was held that the plaintiff was not estopped. There was no pretense of any extrinsic misrepresentation, or the like, on the part of the defendant, by which the plaintiff had been induced to pay rent. There was, therefore, no ground for the rule adopted, except the possession of the plaintiff before and at the time of the attornment; although there is, as we admit, language in the opinions of the judges which, unless read by the light of the facts of the case, might lead to the inference that the case included express misrepresentation or the like. But it is well understood that, on the score of authority, it is the facts and the judgment thereon which constitute the case, and not the mere language of the court in announcing its conclusions.

Gravenor v. Woodhouse, 1 Bing. 38, was also an action of replevin for property distrained for rent. At the trial the defendant put in a written attornment, by which the plaintiff, being in possession at the time, as the attornment upon its face

showed, agreed to hold for one year, and from year to year, at a yearly rent of seventy pounds sterling, without prejudice to any right or claim of his own to the premises.

It was objected on the part of the plaintiff that the language of the avowries was not sustained by the attornment, and evidence was offered of a feoffment made to the plaintiff by a person under whom the defendants claimed, and of certain letters from that person containing expressions which were said to be adverse to the defendants. The court, however, thought the avowries sustained by the language of the attornment, and rejected the evidence, upon the ground that the plaintiff could not dispute his tenancy, after having made the attornment in question. There was no pretense, so far as the case shows, that the attornment had been obtained by any unfair means, not implied in the transaction, on the part of the defendants. The judgment went against the plaintiff, and there was, therefore, no ground for a new trial, except the fact that the plaintiff was in possession when he attorned. A new trial was nevertheless granted, the court holding that the attornment did not estop the plaintiff.

Cornish v. Searell, 8 Barn. & C. 471, was *assumpsit* for use and occupation. A being tenant in possession under B, and a sequestration having issued out of chancery against B, signed the following instrument: "I hereby attorn and become the tenant of C and D, two of the sequestrators named in the writ of sequestration issued in the said suit in chancery, and to hold the same for such time and on such conditions as may be subsequently agreed upon." It was held: 1. That this was an agreement to become tenant, and required a stamp; and 2. That A, not having received possession from C and D, might dispute their title. So far as the statement of facts as given by the reporter shows, there was in this case no suggestion of unfair means not intrinsic on the part of C and D, by reason of which A was induced to attorn to them. Yet it has been said that it was a case of mistake. This statement has no foundation whatever in the facts of the case, and rests entirely upon a single word found in the opinion of Mr. Justice Bayley, who said: "As sequestrators, they [the plaintiffs C and D] have no legal right to receive the rents. It has been said that the defendant, having agreed to become tenant to the plaintiffs, cannot dispute their title. If the defendant had received possession from them, he could not dispute their title. In *Rogers v. Pitcher*, *supra*, and *Gravenor v. Woodhouse*, *supra*,

the distinction is pointed out between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned by mistake to one who has no title. In the former case, the tenant cannot (except under very special circumstances) dispute the title; in the latter, he may." The claim that the case was one of mistake is founded solely upon the use of the word "mistake" in the foregoing passage. There was no mistake whatever as to the title of C and D. There could be none, for the instrument which was signed by A showed upon its face that they were only sequestrators, and therefore without legal claim to the rents. It cannot be supposed that a person in possession will knowingly take a lease from a party who has no title to the premises, and it is not, therefore, a forced use of language to speak of it as a "mistake"; and it is in that sense that we understand Mr. Justice Bayley. But were it otherwise, the incautious use of words by the court cannot override the facts of the case, or limit the force of the judgment. It is very certain that A signed the instrument with his eyes open, knowing all the facts and circumstances, and that it was considered that he was not estopped by that act.

In *Jackson v. Cuerden*, 2 Johns. Cas. 353, the defendant A, being in possession under B, the supposed proprietor, applied by letter to C, as the real owner, to purchase, and requested to be considered as a tenant. In ejectment by C against A, it was held that the latter was not estopped by his letter from showing that his letter was grounded on a mistake, or that the fee existed in himself, or out of the plaintiff: See also *Jackson v. Spear*, 7 Wend. 401.

In all cases where a party out of possession seeks a taking and holding under himself by another in possession, from the very nature of the case there must be a representation by him that he is the owner. The bare proposition to lease involves such a representation, and if he be not the owner, the representation is false. If, under such circumstances, a party in possession takes a lease, his act can be accounted for upon no rational theory except that he was influenced by this express or implied representation. When, therefore, in the opinions of the judges, such expressions are used, their sense is fully satisfied, as we consider, by the intrinsic probability that there was unfair means employed, or there was some mistake, by which the tenant was induced to act; and in our judgment such intrinsic probability not only justifies but requires the

courts to look behind the lease and unearth the truth. As already suggested, the doctrine of estoppel was not designed to secure to any one an advantage over another, but to prevent such a result, and to maintain the *status* which existed at the outset,—to protect the landlord in his actual possession against the trickery or sharp practice of the tenant, not to enable him to impose upon the tenant, and thereby obtain that which before he had not. To hold otherwise would be to blow hot and cold,—to approve fraud and trickery in one, and reprove it in another, in the same breath. At best, the landlord gains the advantage of a *prima facie* case, and casts upon the tenant the burden of overcoming it, for he has but to prove the lease and rest. With this he must be content; for in our judgment the cases which go further are departures from principle, and therefore precedents which ought not to be followed.

Judgment and order reversed, and a new trial granted.

SAWYER, C. J. (dissenting). I dissent. I adhere to the views expressed in my dissenting opinion in the case of *Tewksbury v. Magraff*, 33 Cal. 249. It is unnecessary to repeat them here.

DOCTRINE OF ESTOPPEL CONCLUDES TRUTH IN ORDER TO PREVENT FRAUD AND FALSEHOOD, and imposes silence on a party only where, in conscience and honesty, he should not be allowed to speak: *Calder v. Chapman*, 91 Am. Dec. 163; *Waters's Appeal*, 78 Id. 354.

ESTOPPEL IN PAIS, WHEN IT ARISES: *Chouteau v. Goddin*, 90 Am. Dec. 462, and note 466; *Mills v. Graves*, 87 Id. 314; *Davis v. Davis*, 85 Id. 157.

ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE: *Daniels v. Brown*, 69 Am. Dec. 510, note; *Williams v. Cash*, 73 Id. 739; *Young v. Smith*, 75 Id. 109, and cases collected in note 111.

THE PRINCIPAL CASE IS CITED to the point that the tenant is not estopped from denying his landlord's title, where he did not enter under the lease, but was in possession at the time it was made, in *Peralta v. Ginochio*, 47 Cal. 460; *Palmtag v. Doutrick*, 59 Id. 168; *Pacific etc. Ins. Co. v. Stroup*, 63 Id. 153.

GATES v. SALMON.

[35 CALIFORNIA, 576.]

STATUTE MUST BE SO CONSTRUED AS TO GIVE EFFECT, if possible, to every portion of it, and without rejecting any part as surplusage, or treating it as a repetition of a provision already made.

CONVEYANCE OF SPECIFIC PORTION OF COMMON LANDS BY ONE TENANT IN COMMON, or by any number of them less than the whole, is not void, but cannot be made to the prejudice of the co-tenants not uniting in the conveyance.

GRANTEE ACQUIRES, UNDER CONVEYANCE BY ONE TENANT IN COMMON OF SPECIFIC PORTION of the common lands, all the interest of his grantor therein, which interest is a tenancy in the special tract with the co-tenants of his grantor.

CONVEYANCE BY ONE TENANT IN COMMON OF SPECIAL PORTION OF COMMON PREMISES does not sever the special tract from the general tract of which it is a part, so far as the co-tenants of the grantor are concerned, and as it regards them, the whole tract is subject to partition the same as it would be had the conveyance of the special tract not been made.

UNDER CALIFORNIA PRACTICE, ACTIONS SHOULD BE BROUGHT IN NAME of the real party in interest, and this applies to actions for partition; and a holder under a conveyance by one tenant in common of a specific parcel of the common lands, as well as the co-tenants of his grantor, should be made a party to such action.

WHOLE SCOPE AND TENOR OF CALIFORNIA STATUTE RELATING TO PARTITION OF LANDS show that the intention was to make the one judgment of partition final and conclusive on all persons interested in the property, or any part of it, of whom the court could acquire jurisdiction. Such actions, though regulated to a great extent by the statute, partake more fully of the principles and rules of equity than those of law, both in respect to the mode of procedure prescribed and the remedies provided.

PARTIES ARE ENTITLED ON NEW TRIAL OF ACTION FOR PARTITION OF LANDS ordered by the court on appeal to avail themselves of the documentary evidence used at the former trial, and on file in the court below, including the referee's report of the testimony, and the deeds, exhibits, etc., subject, however, to objection as when first offered.

ACTION for partition. Several of the defendants appealed. The facts are stated in the opinion.

F. D. Colton, for the appellants.

Temple and Thomas, for the respondent.

By Court, RHODES, J. Action for partition of the rancho Laguna de San Antonio. Bartolome Bojorques, the owner of the rancho, conveyed to his eight children jointly the undivided eight ninths of the rancho, and subsequently conveyances of specific portions of the land were executed to divers persons, none of which were executed by all the tenants in common, but all were executed by two or more of them. The tracts thus conveyed are denominated by the parties "special locations," and the grantors "original grantors." Those holding special locations, as well as those holding undivided interests in the rancho, were made defendants to the proceedings. The court ordered a partition of the rancho, and on the coming in of the report of the referees, rendered judgment of partition, without ascertaining and determining the rights and interests of the holders of the special locations,—the

action not having been dismissed as against them,—or ordering any portions of the lands to be set off to them. This constitutes the principal ground of complaint on this appeal.

The first question is, whether the holders of the special locations are proper parties to the action. The language of the statute is sufficiently clear and explicit to afford a solution of the question. The judgment was rendered before the amendment of 1866 to the practice act was passed. Section 264 provides that "where several persons hold and are in possession of real property as joint tenants or as tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein," etc. The respondents contend that this provision includes only those who are joint tenants or tenants in common of the whole tract of which partition is sought. That is the correct construction, if the section is to be considered alone, and without regard to other sections of the act which have a material bearing on the point, and which we will hereafter notice. It is provided in section 268 that "the summons shall be directed to all joint tenants and tenants in common, and all persons having any interest in or any liens of record by mortgage, judgment, or otherwise, upon the property, or any particular part thereof; and generally to all persons unknown who have or claim any interest in the property." The first class described in the section includes joint tenants and tenants in common of the lands of which partition is sought. The next class comprises those having any interest in the whole property, or any particular portion thereof. The third class is the lien-holders upon the whole or any part of the premises. A statute must be so construed as to give effect, if possible, to every portion of it, and without rejecting any part as surplusage, or treating it as a repetition of a provision already made. Provision was made in the first clause for joint tenants and tenants in common of the general tract, and to hold that those mentioned as having an interest in the property must be restricted to such as are joint tenants or tenants in common of the whole would make the provision a useless repetition. And besides this, if it is held that the words "persons having an interest" comprise only joint tenants and tenants in common, they cannot be limited to those who hold such interests co-extensive with the whole property,

for the section includes those also who have such interests in any particular portion of the property.

The appellants' counsel takes the position that a conveyance by one tenant in common, or any number of them less than the whole, of a specific portion of the common lands, is not void. This is not controverted by the other side, but they insist that it is so far void as against the other tenants in common that they may disregard it on partition. The rule upon this point is, that one tenant in common cannot convey any specific part of the land so as to prejudice his co-tenant: *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec. 22]; *Bartlet v. Harlow*, 12 Id. 348 [7 Am. Dec. 76]; *Baldwin v. Whiting*, 13 Id. 57; *Rising v. Stannard*, 17 Id. 282; *Peabody v. Minot*, 24 Pick. 329; *Nichols v. Smith*, 22 Id. 316; *Griswold v. Johnson*, 5 Conn. 363; *Duncan v. Sylvester*, 24 Me. 482 [41 Am. Dec. 400]; *Varnum v. Abbot*, 12 Mass. 474 [7 Am. Dec. 87]; *Robinett v. Preston*, 2 Rob. (Va.) 278. Such is also the doctrine of this court. In *Stark v. Barrett*, 15 Cal. 368, the precise question was presented. The defendants in that case, not claiming as joint tenants or tenants in common, resisted the recovery on the ground that the deed under which the plaintiff claimed title, having been executed by only one of the tenants in common, was void. The court, in disposing of the point, said: "Neither a joint tenant nor a tenant in common can do any act to the prejudice of his co-tenants in their estates. This is the settled law, and hence a conveyance by one tenant of a parcel of a general tract owned by several is inoperative to impair any of the rights of his co-tenants. The conveyance must be subject to the ultimate determination of their rights, and upon obvious grounds. One tenant cannot appropriate to himself any particular portion of the general tract; as, upon a partition, which may be claimed by the co-tenants at any time, the parcel may be entirely set apart in severalty to a co-tenant. He cannot defeat this possible result whilst retaining his interest, nor can he defeat it by the transfer of his interest. He cannot, of course, invest his grantee with rights greater than he possesses. The grantee must take, therefore, subject to the contingency of the loss of the premises, if on the partition of the general tract they should not be allotted to the grantor. Subject to this contingency the conveyance is valid, and passes the interest of the grantor." The rights thus assigned to the grantee are precisely those pertaining to the grantor in the special tract, — no greater, and no less. The grantor, before his convey-

ance of the special tract, held his undivided interest therein subject to the contingency of the loss of it, if on the partition of the general tract the special tract should be allotted to one of his co-tenants. The grantee, then, acquires all the interest of his grantor in the special tract, and that interest is a tenancy in the special tract in common with the co-tenants of his grantor, but his conveyance did not sever the special tract from the general tract, so far as the co-tenants are concerned, and the general tract is therefore liable to a partition, so far as the co-tenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made. It appears, therefore, that aside from the directions of the statute in that respect, the interest of the grantee of the special location shows that he is a proper party defendant in the action.

It is not difficult to show that in some cases the holder of the special location is a necessary party. If he is regarded as an unnecessary and improper party while he holds a conveyance from any one of the co-tenants, he will not be rendered competent to participate as a party to the action by receiving further conveyances from the remaining co-tenants, nor can his position be strengthened in consequence of his grantor's subsequent conveyances to the other tenants in common or to strangers, by specific locations or otherwise, sufficient to cover all the general tract remaining after his conveyance of the first special location. Where an original grantor has covered the general tract with his special locations, as he has parted with interest in the whole tract, he is not a proper party to the partition. Must his original share be unrepresented in the action? Suppose A and B are tenants in common of the general tract, and that A conveys the east half to C, and the west half to D. It is desirable to B to have a partition. Whom will he make defendants? Evidently not A, for he has no interest in the premises, his two conveyances having as completely severed his connection with the general tract as would one conveyance of the whole tract to D alone. C and D are necessary parties, for there is none other whom B can sue as holding an interest of any kind in the tract. If after A's several conveyances, C conveys his interest to D, it cannot be doubted that D is a necessary party, for if the two halves of a thing are equal to the whole, D holds the full and precise interest held by A while a tenant in common with B. All of those conveyances were of special locations, and if they are to be disregarded in the proceedings for

partition, this strange and illogical result would ensue that the claims of one who was unquestionably a tenant in common of the general tract would be disregarded, while another, who held no interest in the premises, would be required to litigate the action with the plaintiff, and be entitled to a judgment confirming to him lands which he had previously conveyed. This will be more apparent, if possible, if, after A's conveyances of the east half to C and the west half to D, B should convey the east half to D and the west half to C. Do both A and B remain competent to conduct the proceedings for the partition after they have parted with all their interest in the whole tract to C and D?

Suppose, again, that A conveys to C and D, respectively, specific parcels by metes and bounds, and then conveys his undivided interest in the whole rancho to B, and that on a survey it is found that the two specific parcels comprise the whole rancho. The deeds of A to C and D vested in them all the interest in the rancho, and as he could claim nothing in the rancho, B, as his vendee, was in no better position in respect to A's half than A would be had he not conveyed to B, and would remain the owner of only the undivided half of the rancho. Whom will B sue as the defendants to his action for partition? Certainly not A, for A conveyed his undivided interest in the whole rancho to B; and if C and D are not proper parties, because of their holding only special locations, B cannot commence the action, for there is no one whom he can make a defendant.

Sufficient attention has not usually been given to the position occupied by the tenant in common after a conveyance of a specific parcel of the general tract. He is often mentioned as a tenant in common of the general tract, but this is not true in any sense nor for any purpose. The remaining tenants in common, in applying for a partition, are entitled to the same relief in every respect that they could demand were the special locations remaining in the hands of the tenant in common who conveyed them; and the same would be the case if, instead of special locations, the tenant in common had conveyed portions of his undivided interest. But not in the one case more than the other are the remaining tenants in common authorized to disregard the conveyances and insist upon the allotment in partition being made to the grantor; and most certainly the grantor cannot be heard to make this claim against his grantees of the special locations.

To illustrate the true position of all the parties in respect to each other, take the plaintiff's case. In 1852, Angela Howe—who then owned the undivided ninth of the rancho—united with others in a conveyance of a tract of 320 acres to J. Denman and E. Denman. It is claimed that after that conveyance she still remained a tenant in common of the whole rancho. Had she conveyed to the Denmans all the rancho except the specific tract of 320 acres, what would have been their relative positions in respect to the undivided ninth which before the conveyance she held? If in the case of the conveyance as it was actually made she would be considered the tenant in common of the whole rancho, in the case supposed the Denmans would occupy that position. But in truth, it makes no difference, in the respect in question, what may be the relative dimensions of the special location and the rancho, for upon her execution of the conveyance of the special location, be it large or small, relative to the whole rancho, her rights for every purpose whatsoever became restricted to that portion of the rancho not included in her conveyances. She thus became, by the execution of her conveyance to the Denmans, simply the holder of an undivided interest in a portion of the rancho, holding the same rights therein that the Denmans took in the portion conveyed to them. The other tenants in common, in procuring a partition, had the right to treat the interest originally held by her as still united, if it became necessary to do so, in order that a proper and equitable allotment of the lands might be made, and she thus became liable to lose on the partition all the lands reserved from her conveyance, as fully as the Denmans to lose theirs, and by the same means; except that the chances in her favor and against the Denmans would increase in the exact proportion that the value of her reservation exceeded that of her grant. Had the two been equal, the liability of each party to lose would have been equal. Each are alike the holders of special locations, and neither she nor the subsequent vendee of her undivided interest in the whole rancho—who, like her, was restricted to the portion of the rancho not sold by her—had the right to participate in and control the partition, to the exclusion of the Denmans. Angela Howe executed eighteen conveyances, and without pausing to compute the amount, assume that they amounted to thirteen thousand out of the twenty-five thousand acres in the rancho of about the average value,—upon

what principle of law, equity, or common sense can she claim the right to be heard in and control the proceedings in partition, to the exclusion of her grantees? We can see no way to avoid the conclusion that if she or her subsequent vendee is a necessary or proper party, her prior vendees also are.

The view that the holders of the special locations are necessary parties is materially strengthened by considering sections 278 and 293 of the Practice Act, in connection with section 268 above cited. It is provided by section 278 that the judgment confirming the report of partition shall be binding and conclusive: "1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the termination of a particular estate therein," etc. The words "any part thereof" necessarily mean, in the connection in which they are used, any part of the property, not any portion of an undivided interest in the property. It would be very inconsistent, if not absurd, that the judgment should be conclusive on those who were not proper parties to the action. The same observations would apply to section 293, which provides for the ascertainment of the value of a vested or contingent future right or estate in any of the property sold. The whole scope and tenor of the provisions of the act relating to partition show that the intention was to make the one judgment of partition final and conclusive on all persons interested in the property, or any part of it, of whom the court could acquire jurisdiction, and not to permit the matter to be taken up in piecemeal; and accordingly provision is made for bringing in not only joint tenants and tenants in common in the whole or any part of the property, but those having future rights or estates, those entitled in remainder or reversion, those having estates for life or for years, and those holding liens by mortgage, judgment, or otherwise; and power is given to the court to try and determine the rights of all the parties to the action, and to order compensation to be made by one tenant to another, so as to equalize the shares allotted to each. To an action of that character the holder of the special location is a necessary party. The action, though regulated to a great extent by the statute, partakes more fully, both in respect to

the remedies provided and the mode of procedure, of the principles and rules of equity than those of law.

Some of the authorities cited by the counsel for the respondent would militate strongly against the conclusion to which we have arrived, were it not for the fact that those cases turn mainly on the terms of the statute under which the proceedings were instituted. Thus in *Harwood v. Kirby*, 1 Paige, 469, it was held that an incumbrancer was not a proper party, because he was not included in the words of the statute. In *Bradshaw v. Callaghan*, 8 Johns. 563, it was decided that the widow in respect to her claim of dower was not a proper party, on the ground that "she is not included in the description of joint tenant, tenant in common, or coparcener, to which class only the statute extends"; but in *Coles v. Coles*, 15 Id. 319 [8 Am. Dec. 231], it was said that the widow was not a proper party where a partition was sought, but that the statute had been amended since the decision in *Bradshaw v. Callaghan*, *supra*, by which she was made a proper party to the proceedings where the object was to sell the premises under the partition act. In *Cook v. Allen*, 2 Mass. 464, the demandant claimed through certain proceedings in partition, in which judgment was taken by default, after notice by publication, according to the statute, and the tenant relied on a disseisin by his grantor of all the tenants in common; and the court held that the judgment was conclusive against the defendant's grantors because he claimed an interest in the land,—which was title in severalty,—and was notified to appear and defend his interest, which he might have done, and have been admitted as a party to the record.

Without proceeding further with a review of the cases cited, it is sufficient to say that those which touch this point are made to depend upon the peculiar provisions of the statute under which the proceedings were had. An exception to this is found in *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec. 22], in which it is held that one joint tenant cannot convey a portion of the premises to a stranger, and the reason given is, "that if he could, his grantee would become a tenant in common of a particular part with the other joint tenant, who, in making a legal partition, might notwithstanding have the whole of the part thus conveyed assigned as his property." This doctrine cannot be sustained. The reason given is the very contingency, subject to which, as it is said in *Stark v. Barrett*, 15 Cal. 368, the grantee takes his conveyance of the specified

parcel. In *Bartlet v. Harlow*, 12 Mass. 347 [7 Am. Dec. 76] the court, in citing the decision in *Porter v. Hill*, *supra*, that one joint tenant cannot convey any specific part of the land to a stranger, adds, "at least not so as to prejudice his co-tenant." The doctrine that one tenant in common may convey a specific part of the general tract subject to the contingency mentioned, is affirmed in *Barnum v. Abbot*, 12 Id. 474 [7 Am. Dec. 87], and many other cases in that state.

Counsel place much reliance upon *Stark v. Barrett*, 15 Cal. 368, as decisive of the correctness of their position. Mr. Chief Justice Field, in delivering the opinion of the court in that case, said: "The grantee [of the special location] must take, therefore, subject to the contingency of the loss of the premises, if upon the partition of the general tract they should not be allotted to the grantor." A portion of the paragraph in which this language occurs has been already cited. The question as to who were proper parties to an action for partition was not involved even in the most indirect manner, nor was it discussed by counsel or determined by the court. In passing on the question whether the purchaser of a specific parcel from one of the tenants in common could maintain ejectment against a stranger to the title, the court held that his title was good against all the world except the other tenants in common, and as to them it was subject to the contingency of being taken by them, if it should be found necessary to do so in order to make a proper partition of the general tract. It was not the purpose of the court to determine who were proper parties to the partition of the general tract, nor to whom the allotment should be made, but simply to say that the grantee of the special tract stood, as to the contingency of its loss, precisely in the stead of the grantor.

The doctrine of courts of equity on this point is stated in 1 Story's Eq. Jur., sec. 656 c, as follows: "And courts of equity, in making these adjustments, will not confine themselves to the mere legal rights of the original tenants in common, but will have regard to the legal and equitable rights of all other parties interested in the estate, which have been derived from any of the original tenants in common; and will, if necessary for this purpose, direct a distinct partition of each of the several portions of the estate in which the derivative alienees have a distinct interest, in order to protect that interest. Thus, where A, B, and C were tenants in common in undivided third parts of an estate comprising Whiteacre and Blackacre, and C

had conveyed his interest in Blackacre to D, and his interest in Whiteacre to E, upon a bill filed by A and B for partition of the whole estate, the court directed that Blackacre should be divided into three parts, and one part should be conveyed to A and B and D, respectively, and that Whiteacre should be divided into three parts, and one part should be conveyed to A and B and E, respectively. In this way, consistently with the rights of A and B, the interests of D and E were, as in equity they ought to be, fully protected and secured." We have already remarked that the main features of the action, as prescribed by the statute, closely resemble those of a suit in equity brought for the same purpose.

It would seem that the respondents, in order to maintain the action, must adopt the view that the holders of the special locations are necessary parties, if it is true—and in our opinion its truth does not admit of a doubt—that the grantor, upon the execution of his conveyance of the special location, parts with all interest therein; and we think they must also support a quite liberal construction of section 264. The action must be brought in the name of the real party in interest, according to section 4, and none of the provisions relating to partition change that rule. After Bartolome Bojorques and his children became each the holder of the undivided ninth of the rancho, they made twenty-two deeds of distinct parcels, each executing one or more deed, but none of the deeds were executed by all the tenants in common, though each deed was executed by two or more of them. All of those deeds were made before any of the "original grantors" conveyed undivided interests in the whole rancho. They, in conveying undivided interests, could not pass any other or greater interest in the rancho, or any part thereof, than they then held. Each tenant in common held nothing in the special location as against his or her vendee of the special location, and consequently, at the time when the action was brought there was no one of all the claimants in the rancho who held an interest as tenant in common in the whole rancho. If none but those interested in the whole rancho are proper parties to the action, neither the plaintiff nor any of the defendants were entitled to institute proceedings for partition, and the result would be a rancho in which more than one hundred persons are interested, which was legally indivisible.

There is no such thing under our system of pleading and practice as a suit in equity for partition distinct from the pro-

ceeding provided for in the act. The rules there laid down are applicable alike to all actions for partition, and we see nothing in those rules, if section 264 should be liberally construed, so as to advance the remedy, as we think it must in order to meet a case like the present, which will preclude the parties here from having a complete partition of the rancho among all the persons interested therein. Nor is there anything in the nature or extent of the interest of the several persons interested that will prevent a partition. There may be many intricate and difficult questions to be settled between the holders of the special locations and those claiming undivided interests in the whole rancho, but they will have to be determined before the partition is complete. If partition is made in this action among the claimants of individual interests in the general tract, reserving the right of those holding specific portions, partition must afterwards be made between each claimant and the holders of the specific portions falling within his allotment, which were conveyed by his grantor. And in making such first partition, the court would, as was done in this case, and as the principles of equity and the dictates of common honesty would require, make the partition in such manner that the special location should, as far as practicable, fall within the share of their several grantors. A complete partition should be made in one action, if practicable, and the parties desire it. It was very properly said by Mr. Chief Justice Sanderson, in *De Uprey v. De Uprey*, 27 Cal. 335 [87 Am. Dec. 81]: "Any question affecting the right of the plaintiff to a partition, or the rights of each and all the parties in the land, may be put in issue, tried, and determined in such actions"; and we may add that, when put in issue, they should be tried and determined, instead of being sent back to be tried in very many new actions: *Morenhout v. Higuera*, 32 Id. 289.

Our conclusion upon this point is, that the grantee of a special location occupies, as to it, the identical position that his grantor held immediately before he executed the conveyance, and that the holder of a special location is a necessary party to the action for the partition of the general tract.

The point presented by the appellants, that by reason of the understanding and verbal agreement among the grantees the grantees took title in severalty to their respective special locations, is not sustainable on the record before us. It presents no finding of that fact, nor evidence from which it should have been found. There would be great difficulty, under the stat-

ute of frauds, in sustaining a partition attempted to be made in that manner.

The error, as alleged by the appellants, and not controverted by the other side, in respect to R. B. Turner and W. B. Comstock, by which a certain interest was allotted to Comstock alone, instead of to him and Turner jointly, will be corrected on the new trial.

It is unnecessary to consider at any length the point made by Anita Bojorques, that on the death of her mother she became entitled to the undivided half of the interest conveyed to Pedro, her father, or so much thereof as he then held; for if on the new trial it shall appear that the conveyance of Bartolome to his children was made for a valuable consideration, as stated by the referee in his third finding, the property became common property, and on the death of the wife of Pedro, the one half then remaining unsold descended to her daughter Anita. Should it appear, however, that the deed was executed as a gift to the trustees, the rule is the reverse, the property becoming the separate property of Pedro: See *Hihn v. Peck*, 30 Cal. 280.

The parties will be entitled to avail themselves of the evidence in the cause remaining in the court below, as well as such further evidence as they may produce; and the court may permit the referees to use the surveys, maps, etc., made by the former referees, so far as the same may be applicable or available under the case made on the new trial.

The whole argument of the counsel for the appellants is inconsistent with the idea that the plaintiff is barred by the statute of limitations; and as this very voluminous and complicated case ought not to be encumbered with unnecessary issues, it may not be improper to suggest that the defendants who have pleaded the statute of limitations should strike out the portion of the answer setting it up, unless they still rely on it; and it may be added that, as but little, if any, question was made, so far as the record before us shows, as to the findings of the referee being supported by the evidence, the parties might readily narrow the issues by agreeing to a large portion of the facts in the case.

Judgment reversed, and cause remanded for a new trial; the costs of the appeal to abide the event.

STATUTES, HOW CONSTRUED: *Conway v. Cable*, 87 Am. Dec. 240; *Sherman v. Buick*, 91 Id. 577; *Harrison v. State*, 85 Id. 658; *Hoemer v. Sargent*, 85 Id. 633; *Reyburn v. Brackett*, 83 Id. 457; *Bausemer v. Mace*, 81 Id. 344; *Mumson*

v. *Hallowell*, 84 Id. 581; *Frankland v. Hallowell*, 84 Id. 582; *Santo v. State*, 63 Id. 487; *Tinsman v. Railroad Co.*, 69 Id. 565; *Parkinson v. State*, 74 Id. 522, and note 534.

CONVEYANCE BY CO-TENANT OF HIS INTEREST in the common property by metes and bounds: See *Whitton v. Whitton*, 75 Am. Dec. 163, and note 171; *Marshall v. Trumbull*, 73 Id. 667, and note 669; he cannot by will devise his interest in specific parts of the common property so as to prejudice his co-tenants: *Whitton v. Whitton*, 75 Id. 163; he cannot grant or demise more than his undivided interest in the common estate, unless he is authorized by his co-tenants to grant or demise their interests also: *Dillon v. Brown*, 71 Id. 700.

ACTION FOR PARTITION, NATURE OF, PLEADINGS, ETC.: *De Uprey v. De Uprey*, 87 Am. Dec. 81; *Johnson v. Johnson*, 83 Id. 675; *Bigelow v. Littlefield*, 83 Id. 484; *Martindale v. Alexander*, 89 Id. 458; *Crane v. Waggoner*, 89 Id. 493.

ALL PARTIES HAVING OR CLAIMING ANY INTEREST IN LAND are not only proper but necessary parties to a suit in partition: *De Uprey v. De Uprey*, 87 Am. Dec. 81.

THE PRINCIPAL CASE IS CITED to the points that in partition all the tenants in common should be made parties, and if one of the tenants in common has conveyed a specific portion of the common lands, his grantee should be joined as a party, in *Sutter v. San Francisco*, 36 Cal. 116; it is cited to the point that the proceeding in partition is one in which the rights of all parties may be fully inquired into and finally determined, in *Martin v. Walker*, 58 Id. 594, and *Emerie v. Alvarado*, 64 Id. 629; and to the point that there is no such thing as a suit in equity for partition, under California practice, distinct from the proceeding provided for in the statute, and that the rules there laid down are applicable alike to all actions for partition, in *Goodale v. District Court*, 56 Id. 35, dissenting opinion of Sharpstein, J.

TYNAN v. WALKER.

[35 CALIFORNIA, 634.]

STATUTES OF LIMITATIONS ARE TO BE STRICTLY CONSTRUED. General words in the statute must receive a general construction, and if there be no express exception, the courts can create none.

UNIVERSAL RULE IN CONSTRUING STATUTE IS, that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto.

FACT THAT THERE IS NO PERSON IN EXISTENCE COMPETENT TO SUE does not prevent the operation of the statute of limitations. So held in an action of ejectment, where the owner of the land had died, and his estate remained for many years without administration, and there was no one capable of suing for possession thereof.

CALIFORNIA STATUTE OF LIMITATIONS CONTAINS NO PROVISION excepting from its operation a case where the party who would have been entitled to sue dies before the cause of action has accrued. In such case, the persons interested in his estate—his creditors, heirs, and devisees—

have the full time allowed by the statute in which to obtain a grant of administration and commence an action.

INTRODUCTION OF PROOF BY PLAINTIFF AT TRIAL, IN SUPPORT OF MATERIAL AVERMENTS in his complaint, which were so defectively denied that, upon motion, such denials might have been stricken out as sham and irrelevant, is a waiver of all objections to the sufficiency of said denials; and an instruction to the jury, asked by the plaintiff, to the effect that the facts so averred were admitted to be true for all the purposes of the trial, may properly be refused.

PLAINTIFF WHO REGARDS DENIALS CONTAINED IN ANSWER AS INSUFFICIENT may take advantage of the fact, by a motion to strike them out on the ground that they are sham and irrelevant.

DENIALS CONTAINED IN ANSWER MAY BE STRICKEN OUT, on motion, as sham and irrelevant, when they do not explicitly traverse the material allegations of the complaint.

ACTION of ejectment, brought by the plaintiff as the administrator of the estate of one Bell, deceased. The defendant had judgment in his favor, and the plaintiff moved for a new trial, one of the grounds being the refusal of the court to give to the jury certain instructions, substantially set out in the opinion. The motion was denied, and the plaintiff appealed. Other material facts appear in the opinion.

J. W. Armstrong, for the appellant.

Gordon and Hunt, for the respondent.

By Court, SANDERSON, J. The principal question involved in this case, and the one upon which the final decision must mainly turn, relates to the defense of the statute of limitations. The case shows that Bell, the plaintiff's intestate, died on the 3d of April, 1854; that the plaintiff was appointed administrator on the 5th of October, 1866, more than twelve years subsequent to the death of Bell; that prior and up to September, 1853, Bell was in the actual occupation and possession of the premises, at which time he made a journey to the Atlantic states, leaving the premises in the care and charge of one Davis; that Bell returned in March, 1854, sick with the small-pox; that he went to the premises, and not finding Davis there, "went up the creek to find him," but without success; that on his return he stopped at the defendant's house to rest, but became worse, was unable to leave, and remained there until his death; that the defendant, on account of the nature of Bell's disease, was unwilling to live in the house with him, and Bell directed Davis to move out of his (Bell's) house and let the defendant occupy it until he (Bell) should recover; that Davis gave the key to the defend-

ant, who thereupon, and before the death of Bell, took possession of Bell's house; that in October, 1854, the defendant took up the premises under the statute in relation to the mode of maintaining possessory actions on public lands (Stats. 1852, p. 158), and has been claiming to hold them in his own right ever since, adversely to the whole world.

Upon the foregoing testimony, the court below instructed the jury, in effect, that the plaintiff's cause of action was barred by the statute of limitations, whether they found that the defendant had entered in the lifetime of Bell, and as his tenant (as claimed by the plaintiff), or entered in October, after the death of Bell, in his own right, and claiming adversely to all the world (as claimed by the defendant); and that the question as to the bar was wholly unaffected by the fact that the appointment of an administrator had been delayed until October, 1866.

It is claimed on the part of the plaintiff that in thus instructing the jury, the court below erred. That inasmuch as, either upon the theory of the plaintiff or of the defendant in respect to the entry of the latter, the cause of action did not accrue until after the death of Bell, the statute did not commence to run until the appointment of the plaintiff as administrator.

In support of this proposition, counsel for the plaintiff appeals to the rule of construction adopted by the English courts in relation to the statute of 21 Jac. I., c. 16, to the effect that the term "cause of action" implies not only a right of action, but also the existence of some person who is competent to sue upon it. The rule was deduced from the maxim of the civil law, *Contra non valentem agere non currit præscriptio*, and it was accordingly held that there must be, not only a cause of action, but a person to sue. So where an action was brought by an administrator upon certain bills of exchange made payable to his testator, but accepted after his death, and the acceptance was more than six years before the commencement of the action, but within six years after administration was granted, it was held that the statute did not begin to run until the grant of administration: *Murray v. East India Co.*, 5 Barn. & Ald. 204; *Cary v. Stephenson*, Salk. 421. This rule has been followed in some of the United States: *Sturges v. Sherwood*, 15 Conn. 149; *Hansford v. Elliott*, 9 Leigh, 79; *Ruff's Adm'r's v. Bull*, 7 Har. & J. 14; *Grubb's Adm'r's v. Clayton's Ex'r*, 2 Hayw. 378; *Wenman v. Mohawk*

Ins. Co., 13 Wend. 267 [28 Am. Dec. 464]; *Geiger v. Brown*, 4 McCord, 423; *Levering v. Rittenhouse*, 4 Whart. 130.

Yet by the same courts it has been held that where the cause of action has accrued to the testator or intestate in his lifetime, the running of the statute will not be stayed by his death until the grant of administration: *Rhodes v. Smethurst*, 4 Mees. & W. 42; *Freak v. Craneheldt*, 3 Mylne & C. 499. It is not easy to perceive why, upon principle, any distinction should be made between the case where the cause of action accrues in the lifetime of the testator or intestate and where it does not accrue until after his death. The only reason which can be given why the statute should not run in any case is, that there is no person to sue, and therefore no person to whom laches can be imputed. But the reason applies to the latter case as well as to the former, and if an exception is allowed in favor of the former, it ought also to be extended to the latter.

The rule adopted by the English courts found no foundation in the terms of the statute of 21 Jac. I., c. 16, which they assumed to be reading. They founded the rule upon the so-called equity of the fourth section of the statute, which excepted from the running of the statute three cases only: 1. Where judgment has been reversed by writ of error; 2. Where judgment has been arrested; and 3. Where an outlawry has been reversed. In all which it was provided "that the plaintiff, his heirs, executors, or administrators, as the case may require, may commence a new action or suit from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after." A somewhat similar provision is found in the statute of this state: Sec. 26.

The interpretation which was given to the statute of James I. was not only inconsistent with itself, but opposed to all the accredited rules of construction. It proceeded upon the theory that the case was within the reason of the exceptions for which the statute itself provided, and that therefore Parliament could not have intended otherwise than was decided by the courts,—a most dangerous and pernicious mode of reasoning, which amounts to judicial legislation, and overturns the maxim that courts are authorized to declare the law only, and not to make it. If they may add at all to the exceptions provided for in the statute, under the pretense that the case before them is of equal equity with those given in the statute,

who is to fix the limit to their interpolations, or establish the line between legislative and judicial functions? If they may add one to the list of excepted cases, by parity of reason they may add another, and so on until the entire body of the statute has become emasculated, and the will of the judiciary substituted for that of the legislature. How much more in keeping with the legitimate exercise of judicial functions are those cases where it has been held that the courts can create no exceptions where the legislature has made none. As in *Hall v. Wybourn*, 2 Salk. 420, where to a plea of the statute the plaintiff replied that the defendant was beyond sea, and it was held that the defendant's being beyond sea did not avoid the statute, because it was not at that time among the excepted cases. The case arose before the statute of Queen Anne, in which the defendant's being beyond the sea was for the first time made an exception. Also in *Boynton's Case*, cited in the last, where Mr. Chief Justice Bridgman held that though the courts were closed, and no suits could be commenced, as in the case of civil war, yet the statute would bar the action, because it was general in its terms, and must affect all cases not expressly excepted. In *Aubry v. Fortescue*, 10 Mod. 206, it was said that the resolution in *Boynton's Case* was often approved by Mr. Chief Justice Holt. See also the opinion of Sir William Grant in *Beckford v. Wade*, 17 Ves. Jr. 87.

Aside from the manifest conflict between the former and latter cases to which we have referred, the former are also at war with the universally accepted general rule that statutes of limitations are to be strictly construed. In *Demarest v. Wynkoop*, 8 Johns. Ch. 146 [8 Am. Dec. 467], it was held that the court made no exception in favor of infants where the statute had made none. Said Mr. Chancellor Kent (page 142): "The doctrine of an inherent equity creating an exception as to any disability where the statute of limitations creates none has been long, and I believe uniformly, exploded. General words in the statute must receive a general construction, and if there be no express exception, the court can create none. It was agreed, without contradiction, in *Stowell v. Zouch*, Plow. 369 b, 371 c, that the general provision in statute of fines would have barred infants, *feme covert*s, and the other persons named in the proviso, equally with persons under no disability, if they had not been named in the exception or saving clause. So in *Dupleix v. De Roven*, 2 Vern. 540, the lord-keeper thought it very reasonable that the statute of limitations should not

run when the debtor was beyond sea; but there was no saving in the case, he could not resist the plea of the statute. The same doctrine is declared, in explicit and expressive terms, by Sir William Grant in *Beckford v. Wade*, 17 Ves. Jr. 37, who refers to the opinion of Sir Eardly Wilmot, in *Lord Buckinghamshire v. Drury*, Wilmot's Opinion, 177, sec. 194, and to the decisions of the common-law courts, *Hall v. Wybourn*, 2 Salk. 420, *Aubry v. Fortescue*, 10 Mod. 206, that 'though the courts of justice be shut by civil war, so that no original could be sued out, yet the statute of limitations continued to run.'

In *McIvar v. Ragan*, 2 Wheat. 25, the statute of limitations of the state of Tennessee came before the supreme court of the United States. The action was ejectment. Both parties claimed under patents from the state of North Carolina,—the defendants under the junior patent and a possession of seven years, which, by the statutes of North Carolina and Tennessee, constituted a bar to the action if the possession was under color of title. The plaintiffs, to repel the defense of the statute, proved that no corner or course of the grant under which they claimed was marked, except the beginning corner; that the beginning, and nearly the whole land, and all the corners except one, were within the boundary of lands reserved by treaty for the Cherokee Indians, which were not ceded to the United States until within seven years before the commencement of the action. The laws of the United States prohibited all persons from surveying or marking any lands reserved by treaty for the Indians, and accordingly, it was claimed on the part of the plaintiffs that the statute of limitations ought not to be allowed to run against them until from the date of the cession to the United States, because before that day they were prohibited by heavy penalties from making the necessary surveys to show that the defendant was within their lines. But Mr. Chief Justice Marshall said: "The case is admitted to be within the act of limitations of the state of Tennessee, and not within the letter of the exceptions. But it is contended that as the plaintiffs were disabled by statute from surveying their land, and consequently from prosecuting the suit with effect, they must be excused from bringing it, and are within the equity though not within the letter of the exceptions. The statute of limitations is intended, not for the punishment of those who neglect to assert their rights, but for the protection of those who have

remained in possession under color of title believed to be good. . . . Where the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far for this court to add to those exceptions. . . . It has never been determined that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, though created by the legislature, shall take such case out of the operation of the act of limitations, unless the legislature shall so declare its will." He then proceeded, however, to show that the plaintiff's case was not within the equity of the exceptions of the statute.

It is a universal principle of construction that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto: *Beckford v. Wade, supra*. The rule upon the subject of implied exceptions is well stated by Sir Eardly Wilmot in *Lord Buckinghamshire v. Drury, supra*. He said: "Many cases have been put where the law implies an exception, and takes infants out of general words by what is called a virtual exception. I have looked through all the cases, and the only rule to be drawn from them is, that where the words of a law, in their common and ordinary signification, are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature manifested by other parts of the law,—from the general purpose and design of the law, and from the subject-matter of it." And he cites the statute of limitations as an instance in which infants would be barred if it were not for the introduction of an exception in their favor. This rule of Sir Eardly Wilmot is illustrated upon the other side by the first statute of Wills, 32 Henry VIII., instanced for that purpose by Sir William Grant in *Beckford v. Wade, supra*, which declares that all and every person or persons may devise their lands by will. The language of the statute was broad enough to include infants and insane persons, yet without the aid of the subsequent explanatory statute of 24 Henry VIII., which it was, nevertheless, thought expedient to pass, the obvious intent of the statute being to make a will a competent mode of conveying land, it could not have been intended thereby to render persons com-

petent to convey by will who were incompetent to convey by any other mode.

We have thus glanced at the condition of the law for the purpose of showing that the rule which the plaintiff has invoked has its foundation in judicial construction, and not in the language or general purpose and design of the statute, and that it is opposed to all the well-established rules by which courts should be guided in ascertaining and giving effect to the will of the legislature, and for the further purpose of justifying ourselves, if any justification be required, in adopting the same rule of construction in relation to the statute of limitations which we uniformly apply to all other statutes,—that is to say, to read it as it is written, without any arbitrary subtraction or addition to its meaning. The violation of this rule, as we consider, which we have noticed, can be accounted for only by referring it to the well-known hostility of the courts at an early day to statutes of limitations. That hostility no longer exists, and with it, in our judgment, its effects also should be allowed to pass away.

The statute provides that civil actions shall be commenced within certain periods therein prescribed “after the cause of action shall have accrued.” The clause “after the cause of action shall have accrued” does not, in our judgment, imply, in addition, the existence of a person legally competent to enforce it by suit. If it did, why in subsequent parts of the statute provide that the statute shall not run in certain cases specified, which are excepted from the operation of the statute, because the persons in whose favor the cause of action exists are legally incompetent to sue? Obviously, if the term “right of action” implies the existence of a person competent to commence an action, there was no occasion for special provisions relieving persons not competent from the operation of the statute. Nothing further need have been said, for the courts, after having ascertained the existence of a right of action, would have next inquired whether there was any person in existence legally competent to enforce it by suit, and computed the time accordingly. Again, if it was the intention to provide that the statute should run only where there is both a right of action and a person to assert it, why not insert a provision to that effect in general terms, and not take the hazard by going into details of omitting cases which ought, on the score of equal equities, to be included?

But again, if we assume that the term “cause of action”

contains also a general implication in relation to disabilities, what, in view of the subsequent specification of disabilities, becomes of the settled rule that general words are limited by special words subsequently employed, or the maxim, *Expressio unius est exclusio alterius*?

But it is unnecessary to enlarge upon this point. Leave out of view the judicial interpretations which we have noticed, and which we have indicated our purpose to discard, there is no doubt as to the meaning of the statute. It must run in all cases not expressly excepted from its operation.

There is no provision of the statute excepting a case of this kind from its operation. The twenty-fourth section provides an exception, where the party entitled to bring an action dies after the cause of action has accrued, and before the expiration of the time allowed for commencing the action, and also where the party against whom an action may be brought dies before the expiration of the time allowed, but no provision is made excepting a case where the party who would have been entitled to sue dies before the cause of action has accrued.

Nor do we perceive any substantial reason why any exception should be made. If the cause of action does not accrue until after the death of the party who would have been entitled to sue, the persons interested in his estate—his creditors, heirs, and devisees—have the full time allowed by the statute in which to move in the matter to obtain a grant of administration and commence an action. Even if we recognized the doctrine of inherent equity or implied exception, we are unable, independent of the judicial dogma that the term “cause of action” also implies a person to sue, to perceive that this case falls within the principle. It certainly has less equity than the case where the cause of action has accrued in the lifetime of the party; yet in such a case the statute runs on, according to the cases to which we have referred, even though there may not be forty-eight hours of the limitation remaining at the time of his death. The legislature of this state seems to have considered this latter result of the English statutes as unreasonable, and has therefore provided, as we have seen, that the time allowed to sue shall be extended, if necessary, not to exceed six months from his death, thus affording time to obtain a grant of administration and sue.

We may add, in conclusion, that in view of this provision in relation to cases where the cause of action has accrued be-

fore the death, to the effect that the time may be extended not to exceed six months from the death, it would be exceedingly anomalous to hold that if it accrues one day after death the time to sue shall be extended indefinitely, the extension to be measured only by the tardiness of those who are interested directly or indirectly in bringing the action.

We are also of the opinion that the court below did not err in declining to instruct the jury that certain facts were settled for the purposes of the trial, by the admissions of the defendant, in not denying them in his answer. Conceding the denials to have been defective, the plaintiff had gone into the evidence in relation to them without questioning their sufficiency, and we think it was too late to do so after the testimony was in and the time for instructions had arrived. Where the defendant has intentionally admitted certain allegations by not denying them, it is proper, to avoid all mistakes on the part of the jury, for the court to so instruct; but where, as in the present case, the question is as to the sufficiency of the denials, we do not consider it the proper practice. By introducing testimony, the plaintiff waived all objection to the denials upon that ground. He treated the denials as sufficient, and thus misled the defendant. If he regarded the denials as insufficient, and desired to take advantage of that circumstance, he should have moved to strike them out, upon the ground that they were sham and irrelevant. Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, or immaterial, may be stricken out on motion: Practice Act, sec. 50. Answers consisting in whole or in part of defective denials, which do not explicitly traverse the material allegations of the complaint, are, as to such denials, sham and irrelevant within the meaning of the statute: *People v. McCumber*, 18 N. Y. 315 [72 Am. Dec. 515]; *Gay v. Winter*, 34 Cal. 153.

Under the foregoing views, the remaining points require no special notice.

Judgment and order affirmed.

RHODES, J., expressed no opinion.

CONSTRUCTION OF STATUTES: See *Gates v. Salmon*, ante, p. 139, and cases collected in note.

STATUTE OF LIMITATION, CONSTRUCTION: *Coleman v. Walker*, 77 Am. Dec. 163; *Porter v. Elam*, 85 Id. 132; how pleaded: *Boyd v. Blankman*, 87 Id. 146, and note 164; *Ragland v. Morton*, 81 Id. 516.

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EFFECT OF ABSENCE FROM STATE upon the running of the statute of limitations: *Langdon v. Doud*, 84 Am. Dec. 641, and note on subject 644; the statute does not run in favor of one who has been guilty of fraud or concealment: *Hoyle v. Jones*, 89 Id. 273; and see *Webster v. Newbold*, 82 Id. 487; *Munson v. Hallowell*, 84 Id. 582.

SHAM PLEADINGS, MOTION TO STRIKE OUT: *People v. McCumber*, 72 Am. Dec. 515, and note 522; *Hill v. Jamieson*, 79 Id. 414.

THE PRINCIPAL CASE IS CITED to the point that courts are not authorized to interpolate other exceptions than those expressed in the statute of limitations itself, in *Meeks v. Vassault*, 3 Saw. 217; and is cited in *Crowley v. City R. R. Co.*, 60 Cal. 630, to the point that under the circumstances of the latter case, the defendant cannot be permitted to raise the point on appeal, that the verdict of the jury was against an admission made by the pleadings.

BOLANDER v. GENTRY.

[85 CALIFORNIA, 105.]

ACTION TO RECOVER POSSESSION OF PERSONAL PROPERTY MAY BE DEFEATED by a showing that during the pendency of the action, and before a trial thereof, the defendant has been required to deliver, and has delivered, the property to a third person, entitled to its possession as against both plaintiff and defendant.

ACTION AGAINST SHERIFF TO RECOVER POSSESSION OF PERSONAL PROPERTY SEIZED UNDER ATTACHMENT MAY BE DEFEATED by showing that the defendant in attachment transferred the property attached to the plaintiff with intent to hinder, delay, and defraud his creditors, and that such defendant, during the pendency of the action, and before a trial thereof, was declared a bankrupt, and the sheriff, on demand of the assignee in bankruptcy, delivered the property to such assignee.

ASSIGNEE IN BANKRUPTCY UNDER LAWS OF UNITED STATES IS ENTITLED TO POSSESSION OF PROPERTY transferred with intent to hinder, delay, and defraud creditors as against both the transferee and the sheriff who subsequently attaches the property in such transferee's hands as belonging to the bankrupt.

ACTION to recover the possession of personal property. The facts are stated in the opinion.

Whiting and Naphtaly, for the appellant.

A. A. Sargent and T. B. Reardon, for the respondents.

By Court, SAWYER, C. J. This is an action to recover certain personal property, seized on the 29th of May, 1867, by the defendant, who was sheriff of Nevada County, as the goods of one Wiedero, under an attachment issued in the suit of *Dinkelspeil v. Wiedero*. The answer alleged the seizure in the character of sheriff, and that the goods were at the time the property of Wiedero.

Subsequently the defendant filed a supplemental answer, in which he averred that since the commencement of the suit, on the 29th of July, 1867, one Henry Epstein filed his petition in bankruptcy in the district court of the United States against said Wiedero, setting forth that he was a creditor of Wiedero, and the other facts required by the act of Congress to establish a uniform system of bankruptcy in the United States, and averring that on the 24th of May, 1867, said Wiedero, being possessed of certain goods, wares, and merchandise, consisting of watches, jewelry, etc., in a store at Grass Valley, did make an assignment, sale, and transfer of the whole thereof to Bolander and Getz, said plaintiffs, with intent to delay, hinder, and defraud his creditors; that the same was done in contemplation of insolvency, with a view to hinder, etc., his creditors, and defeat the operation of said act of Congress; that said court made an order requiring said Wiedero to appear before said court on the 12th of August, 1867, etc.; that said Wiedero appeared and answered, and upon hearing was adjudged and declared a bankrupt, etc.; that one Hyde was duly appointed assignee in bankruptcy of Wiedero, and all the estate, real and personal, of which Wiedero was the owner on the 29th of July, 1867, assigned to said Hyde; that in pursuance of said assignment, and said act of Congress, said assignee made a demand upon defendant for the possession of the said property in dispute in this action, and took the whole of said property from defendant, and the said assignee is now in possession thereof; that said property referred to in said petition in bankruptcy, and in the complaint in this action, was, at the time of said transfer by Wiedero to Bolander and Getz, all the property owned by said Wiedero; and that said Bolander and Getz well knew that it was all the property said Wiedero had, and knew that he at the time owed other debts amounting to upwards of four thousand dollars, and was utterly insolvent; also avers that the facts set forth in the petition in bankruptcy are true, and that this came to his knowledge since the filing of the original answer in this case. On motion of plaintiffs, the supplemental answer was stricken out as irrelevant and impertinent, and constituting no defense,—to which action defendant excepted.

The question is, whether the answer constituted a defense, in whole or in part, to the action. It is unnecessary to inquire whether it would or would not have constituted a defense to the old technical action of replevin.

The action is to recover the possession of personal property. No delivery was made to the plaintiff. In order to maintain the action, a right to the possession must have existed in the plaintiff at the time of the commencement of the action. But, if before the trial of the action his right to the possession has ceased, and the defendant has been required to deliver, and has delivered, the property to the party entitled to its possession, we do not see why that fact may not be set up, so as to defeat a recovery of the possession or the value of the property: *O'Connor v. Blake*, 29 Cal. 316. It might not defeat a recovery of the costs of the action, or damages accrued up to the time the contingency happened, but why not defeat a recovery of the possession, or of the value of the property? Such would be the result in an action to recover real estate, both under section 256 of the practice act, and at common law. We see no good reason why the same principle should not apply with reference to actions to recover personal property under our system. Section 67 of the practice act provides that "where circumstances, occurring subsequently to the commencement of the action, render it proper, the same may be presented by supplemental pleadings, and issue taken thereon in the same manner as in the case of original pleadings." The only question is, whether the circumstances occurring in this case contain any substantial matter of defense. If property in the hands of a bailee is wrongfully taken from his possession by a stranger, at a time when the bailor is entitled to demand and receive the possession from the bailee, the bailee might undoubtedly maintain an action to recover the possession from the party wrongfully depriving him of it. But if, pending the action, the defendant himself should acquire from the bailor the title to the property and right of immediate possession, would it be pretended that the facts, if promptly set up in a supplemental answer, would not constitute a defense against a recovery of the possession, or of the value of the property? Upon what principle could the possession be taken from the owner having a right of immediate possession by the party who has ceased to have any right of possession? So if the bailor, having the right of immediate possession, should demand the possession of the defendant pending the action, and he, having no right of possession, should yield to the demand of the party entitled, or its possession should be lawfully recovered in an action by such party, upon what principle could the plaintiff, who has no

further right to the possession of the property, still recover after these facts are made to appear in due time and form? We can perceive no reasonable grounds upon which such a claim could be maintained. The defendant could not lawfully resist the demand of the real owner entitled to immediate possession, nor successfully defend an action brought by him; and if the bailee, with no right of possession as against the bailor, could also maintain the action in the face of such a defense, properly set up, he would be liable twice over for the property or its value for the same act.

In the present case, if the facts set up in the supplemental answer are true, the assignee is entitled to the possession of the goods in question, as against both plaintiffs and defendant, and the defendant could not lawfully have resisted the demand of the assignee for the possession of the goods. He was bound to deliver them up on demand. Had he not done so, the assignee could have recovered them. The goods, according to the averments of the answer, were the only property of Wiedero on the 24th of May, 1867, the date of the transfer to plaintiffs. He was on that day largely insolvent. Plaintiffs knew these facts. The transfer was made in contemplation of insolvency, and with a view to hinder, delay, and defraud his other creditors, and give preference to plaintiffs. The petition of Epstein was filed on the 29th of July, 1867, within four months. Wiedero was adjudged a bankrupt. The act of Congress makes the sale to plaintiffs, under the state of facts alleged in the supplemental answer,—and for the purposes of this decision the allegations must be taken as true,—void, and vests the title and right of immediate possession of the property sold and transferred to plaintiffs, as well as property not transferred, if any there was, in the assignee. For the purposes of the act, Wiedero was, in law, on the 29th of July, 1867, still the owner of the property so fraudulently transferred to plaintiffs: 14 U. S. Stats. at Large, 522, 523, sec. 14; p. 524, sec. 15; p. 534, sec. 35; p. 536, sec. 39; p. 537, sec. 42. From the moment of the assignment, the plaintiffs, on the facts averred, ceased to have any title to the property, or right of possession. The title and right of possession vested in the assignee. The defendant could not resist a recovery, and he delivered the property to the party entitled. He did simply what the law both authorized and required him to do. The title and right of possession having passed from the plaintiffs, and the property having been delivered to the party entitled, they are, in

our judgment, no longer entitled to recover its possession. Their right has terminated pending the action. The matter set up, therefore, was material, and was improperly stricken out.

The judgment and order denying new trial reversed, and new trial granted, and *remittitur* directed to issue forthwith.

CROCKETT, J., having been of counsel, did not sit in this case.

FRAUDULENT SALE BY DEBTOR MAY BE AVOIDED BY ASSIGNEE IN BANKRUPTCY OR INSOLVENCY, subsequently appointed: Note to *Gardner v. Lane*, 85 Am. Dec. 785; *Ashley's Adm'r v. Robinson*, 65 Id. 387; but an attaching creditor cannot avoid a sale on the mere ground that it is in violation of the insolvent law: *Gardner v. Lane*, 85 Id. 779. Where a transfer by a bankrupt is fraudulent and void, the transferee holds the property for the assignee in bankruptcy, and the assignee may sue him for its recovery: *Fox v. Gardner*, 21 Wall. 478; S. C., 12 Nat. Bank. Reg. 139, referring to the principal case. Transfers to defeat the operation of the bankruptcy law are absolutely void, and the title to the property vests in the assignee upon his appointment: *Stevenson v. McLaren*, 23 Minn. 113; S. C., 14 Nat. Bank. Reg. 405, citing the principal case; but see the principal case distinguished in *Bromley v. Goodrich*, 40 Wis. 139.

THE PRINCIPAL CASE IS REFERRED TO in *Rison v. Powell*, 28 Ark. 436, on the point that state courts have concurrent jurisdiction with the national courts over actions by assignees in bankruptcy.

WETHERBEE v. DUNN.

[86 CALIFORNIA, 147.]

ALL WHO COME INTO POSSESSION OF LAND AFTER ACTION BROUGHT MUST, PRIMA FACIE, GO OUT under writ of possession, if the plaintiff recovers; for the presumption is, that they came in under the defendant.

ONE WHO COMES INTO POSSESSION OF LAND UNDER JUDGMENT COLLUSIVELY OBTAINED AGAINST DEFENDANT in an action to recover possession of the land, pending the action, must go out under a writ of possession against the defendant.

ACTION to recover possession of land. The facts are stated in the opinion.

Sharp and Lloyd, for the appellants.

S. F. and J. Reynolds, for the respondent.

By Court, SAWYER, C. J. We are satisfied, as the court below must have been, that this case presents another instance of an indirect effort, through other parties, to evade the process of the court, and deprive the plaintiff, in an action to recover

land after a long and successful litigation, of the fruits of his judgment.

The action to recover the land in question was commenced in May, 1865. The defendants, Quinn and Carroll, having answered, the action, as between them and plaintiff, was tried, a verdict found, and judgment for the possession rendered in favor of plaintiff on the 4th of August, 1866. Quinn and Carroll, having first moved for a new trial, and the motion having been denied, appealed to this court, and the judgment of the district court was affirmed on the 29th of March, 1867. The *remittitur*, however, was not issued from this court till July 19, 1867, being stayed by petition for rehearing. It was filed in the court below July 22, 1867. On the 25th of April, 1867, after judgment of affirmation in this court, and before the *remittitur* issued, one David Fitzgibbon commenced suit in the twelfth judicial district against said defendant Quinn to recover a portion of the same premises, and due service being had, recovered judgment by default on the 10th of May following, upon which a writ of possession issued on the same day, which writ was executed, and Fitzgibbon put in possession by the sheriff on the 9th of July, 1867. On the 3d of May, 1867, one Jonathan Pell commenced an action against defendant Carroll to recover the remainder of said premises, upon which he also recovered judgment for possession by default on the 16th of July, 1867, upon which a writ of possession issued on the same day, which was executed by the sheriff, and plaintiff Pell put in possession on the 18th of July, 1867. Upon the filing of the *remittitur* from this court in the case, on the 22d of July, 1867, the district court issued a writ of possession, which was delivered to the sheriff, but the sheriff declined to execute it, on the ground that he had already turned out the defendants under the writs in the said cases of *Fitzgibbon v. Quinn* and *Pell v. Carroll*, and placed said Fitzgibbon and Pell in possession, and that they were now in possession upon a title adverse to both the plaintiff and defendants in this action; and that, as they were not parties to the action, their rights were not affected, and they were not liable to be turned out under the writ. Proceedings were taken to compel the execution of the writ, which failed. An *alias* writ was issued on the 23d of January, 1868, which the sheriff refused to execute for like reasons, and the plaintiff thereupon applied to the district court for an order to compel the sheriff to execute the writ. The application was heard upon the

record and affidavits and counter-affidavits of the parties, and after consideration the court made an order requiring the sheriff to execute the writ in accordance with its commands, and put the plaintiff in possession of the land; and the sheriff appeals from the order.

We have no doubt of the propriety of the order. The respondents charge, and upon the facts disclosed by the record we are satisfied, that the judgments obtained and the proceedings had under them, in the two cases brought by Fitzgibbon and Pell against Quinn and Carroll, were collusive between the parties to those actions, and for the purpose of evading the writ, and depriving the plaintiff of the fruits of his judgment in this action. Collusion is nowhere directly or squarely denied in the respondents' affidavits. They say it is true that they are in possession, claiming adverse to both parties and for themselves, and not for Carroll and Quinn; but this is evasive, and does not meet the issue. They nowhere aver that they have a good title in fact. The allegations on this point are loose and evasive. It appears that on the 22d of April, 1867, Pell and Fitzgibbon took the quitclaim deed from one Lynch of the respective tracts which they recovered, and within a very few days afterward commenced their suits. This is the only title they pretend to have. It is nowhere shown that Lynch had any title. It is said he claimed a title founded on possession; that is all. Upon this they claim to have recovered. The deed was taken, the actions brought, judgment recovered against defendants, and executed by putting the plaintiffs respectively in possession within a few days after the judgment in *Wetherbee v. Dunn* was affirmed, and while the *remittitur* was stayed. The circumstances required expedition, and the proceedings were without opposition and altogether too expeditious, under the circumstances, to indicate good faith. Fitzgibbon is shown to be a brother-in-law of the defendant Quinn, whom he was so vigorously prosecuting, and Carroll appears from the affidavit of Corbett to be acting in concert with Pell, who was also vigorously prosecuting him, and facilitating the obtaining of possession of the premises under his judgment. There is some attempt, it is true, to break the force of Corbett's affidavit, but the whole atmosphere and circumstances surrounding these transactions indicate that these judgments and the possession under them were collusively obtained for the purpose of evading plaintiff's writ.

In *Leese v. Clark*, 29 Cal. 671, we said: "*Prima facie*, all who come into possession after action brought must go out, for the presumption is, nothing to the contrary appearing, that they came in under the defendant. This presumption is not overthrown by showing that they came in as tenants of John Clark, without showing affirmatively that John Clark also came in before suit brought, or at least, that he has come in under a title adverse to that of the defendant, not in collusion with him, and under such circumstances as would entitle him to the protection of the court on a proper application against the writ." The word "defendant," where it occurs the second time in the foregoing extract, by a typographical error reads "plaintiff" in the report: Id. 671. It should be defendant in the report, not plaintiff. We have corrected the error once before (*Mayne v. Jones*, 34 Cal. 487), but as counsel still quote it as printed, we call attention to it again, and suggest that attorneys make the correction in their volume of reports. We also said in that case that "the fruits of a successful litigation cannot be wrested from the prevailing party, and the process of the courts evaded, upon a mere claim set up under suspicious circumstances, resting upon affidavits alone, unless the case made by that kind of proof is reasonably certain": *People v. Thompson*, 34 Cal. 672; see also *Mayne v. Jones*, 34 Id. 484. In this case there is no title, or fact showing title, directly averred anywhere by respondents, in themselves or Lynch, who quitclaimed to them under the circumstances stated. There is a loose statement of a claim of title only. The entry, notwithstanding it was made under cover of legal process, appears to us to have been collusive, by means of judgments hastily and collusively obtained for the purpose, by persons shown to be friendly to the defendants, after the judgment in the action in which this proceeding was taken was affirmed, and when there was no hope left of avoiding the result in any other mode.

We are satisfied that the writ ought to be executed. If the parties resisting the application in the name of respondents could succeed upon the case as presented by this record, there would be little difficulty in evading the process of the courts in all cases of the recovery of lands, and such actions would become nugatory.

The parties in possession came in under Pell and Fitzgibbon, and stand in no better position than they. If they have any rights in the premises, they must be vindicated in an

action brought for that purpose, in which their title may be investigated.

They have not shown a *prima facie* case to justify a refusal by the court to execute its process in this case.

Order affirmed, and *remittitur* directed to issue forthwith.

WHO MAY BE DISPOSSESSED IN EJECTMENT: See *Howard v. Kennedy's Ex'rs*, 39 Am. Dec. 307, and note discussing the question; *Wallen v. Huff*, 65 Id. 49; and see *Brush v. Fowler*, 85 Id. 382.

McCORMICK v. BROWN.

[36 CALIFORNIA, 180.]

CONTINUING CONTRACT AND NEW CONTRACT MAY BE PROVED, it seems, under section 31 of the California statute of limitations, which provides that "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this statute, unless the same shall be contained in some writing, signed by the party to be charged thereby." The acknowledgment or promise made while the contract is a subsisting liability establishes a continuing contract, and when made after the bar of the statute, a new contract is created.

STATUTE OF LIMITATIONS DOES NOT OPERATE TO EXTINGUISH DEBT or raise a presumption of payment, it seems, but only bars the remedy, and thus becomes a statute of repose.

CAUSE OF ACTION IS FOUNDED UPON NEW PROMISE, and not upon the original contract, it seems, where a creditor relies upon a new promise after the statute has run upon the original contract; the original contract, or the moral obligation arising thereupon, being the consideration for the new promise.

ACTION ON NEW PROMISE TO PAY JUDGMENT MUST BE BROUGHT WITHIN FOUR YEARS from the making of the new promise, it seems, to avoid the bar of the California statute of limitations, under section 17, which provides that an action upon any contract, obligation, or liability founded upon an instrument in writing, other than a judgment or decree, must be brought within four years.

CREDITOR CANNOT RECOVER AFTER STATUTE OF LIMITATIONS HAS RUN UPON ORIGINAL CONTRACT of obligation, without proving a new promise.

NEW PROMISE, TO REMOVE BAR OF CALIFORNIA STATUTE OF LIMITATIONS, MAY BE EXPRESS OR IMPLIED. An express promise must be proved by producing the promise itself; while an implied promise must be proved by the production of the acknowledgment from which the promise is implied.

ACKNOWLEDGMENT, TO TAKE CASE OUT OF OPERATION OF STATUTE OF LIMITATIONS, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay. Such acknowledgment cannot be deduced from a promise or an offer to pay a part of the debt, or to pay the whole debt in a particular manner, or at a specified time, or upon specified conditions.

CREDITOR CANNOT RECOVER UPON OFFER OR CONDITIONAL PROMISE BY DEBTOR TO PAY DEBT, it seems, without showing an acceptance of the offer or a performance of the condition on his part.

ACTION commenced in June, 1866, upon a judgment obtained in 1852, in which the plaintiff, to take the case out of the statute of limitations, relied upon the following letter written to him by the defendant August 4, 1863:—

"Sir,— I can now make your offer good. I have by a little streak made a small raise over expenses. I will say just what I can do. I can pay you \$350 at any time now, and \$350 in one year from the time I do the first, and \$400 in two years from the date of first payment, in American gold coin. . . . No man shall ever lose one dollar by me, for sooner or later all will and shall be made right. I am interested in some silver leads that bid fair to prove good, and it matters not if my notes are not due, the moment I lay my hands on money enough to pay you, you shall have it. Now, what I wish to say is this: I want you to send my note to Mr. Jacoby. Clear me of that judgment in Ottoway. I will pay to him the first installment. Give him my notes, which will be paid on the day as soon as they become due, or sooner if I can make the money. Now, to prove this, you may have Mr. Jacoby come and see if I cannot do it. . . . What I say to you will be done without fail. If I could use my name, I could make money. . . . If I lack a few dollars of my own earning, I can get help to get through with this affair of yours from a friend. Now, all you have to do is to send to Jacoby or to myself, and as I have said before so I will surely do.

"Truly yours, S. A. BROWN.

"The \$350 is ready. Let me hear from you soon.

"P. S. . . . Now, let me clear off that judgment at once, and I will save money; otherwise I cannot. If in time to come I am successful, I will agree to pay you even more for waiting for me. You have nothing to fear about my not paying you, if you release me.

"Yours, BROWN."

The plaintiff had judgment, and the defendant appealed therefrom, and from an order denying his motion for a new trial. Further facts are stated in the opinion.

S. and George E. Williams, for the appellant.

George G. Blanchard, for the respondent.

By Court, RHODES, J. The plaintiff alleges that in 1852 he recovered a judgment against the defendant in the circuit court for the county of La Salle, state of Illinois, for \$1,155.50; and that in consideration thereof the defendant, on the 4th of August, 1863, promised, in writing, to pay the whole of said judgment in gold coin. The action was commenced in June, 1866. The court found that the defendant, on the 4th of August, 1863, in writing, acknowledged the debt to be due to the plaintiff, and at the same time, and in like manner, promised to pay the same to the plaintiff in gold coin. The question is, whether the evidence sustains the finding.

It is provided by section 31 of the statute of limitations that "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this statute, unless the same be contained in some writing, signed by the party to be charged thereby."

There are two ultimate facts that may be proved in the mode prescribed,—a continuing contract, and a new contract. The acknowledgment or promise made while the contract is a subsisting liability establishes a continuing contract; and when made after the bar of the statute, a new contract is created. In this case we have to deal with the latter aspect of the statute.

By section 17 of the statute, an action upon a judgment can only be commenced within five years; and by the same section, an action upon any contract, obligation, or liability founded upon an instrument in writing, other than a judgment or decree, is limited to four years. It seems now to be well established by the authorities that the statute does not operate to extinguish the debt,—does not raise the presumption of payment,—but it only bars the remedy, and thus becomes a statute of repose. This position is clearly sustainable upon principle; for if the debt is extinguished, there is no consideration for the new promise.

When the creditor sues, after the statute has run upon the original contract, his cause of action is not the original contract, for his action thereupon is barred, but it is the new promise. There are many authorities the other way, some holding that the new promise takes the case out of the statute, others that it removes the bar of the statute, and others still that it revives the original contract. But the better opinion is, that the action is sustainable only upon the new promise, the

original contract, or the moral obligation arising thereupon, binding *in foro conscientie*, notwithstanding the bar of the statute being the consideration for the new promise. Section 31 is not an exception to section 17, — is not of the nature of a proviso to that section, — like the disability clauses; but it provides the manner in which the original contract may be continued, or a new promise made. Within what time must the judgment creditor, relying on the new promise, sue? The answer, we think, would be unanimous that the action must be brought within four years from the making of the new promise. The authorities upon the point of a new promise are very ably reviewed in Angell on Limitations, page 218, and following; but the circumstances of this case do not require that we should pursue this question further, for whatever may be its true solution, the creditor cannot recover after the statute has run upon the original contract or obligation without proving the new promise.

The promise may be either express or implied. Section 31 provides two modes in which the promise may be proved, — the one by producing the promise itself, the express promise, and the other by the production of the acknowledgment from which the promise is implied. The acknowledgment serves no other purpose than that, and there are no other means by which the implied promise may be proved. When the express promise is shown, the acknowledgment, if there be one, has no effect, for the law will not imply a promise in the presence of an express promise covering the same ground.

The acknowledgment referred to in the statute is not such as may be deduced by inference from a promise or an offer to pay a part of the debt, or to pay the whole debt in a particular manner, or at a specified time, or upon specified conditions. The acknowledgment, say the cases, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay: *Bell v. Morrison*, 1 Pet. 351; *Sands v. Gelston*, 15 Johns. 511; *Jones v. Moore*, 5 Binn. 573 [6 Am. Dec. 428]; *Berghaus v. Calhoun*, 6 Watts, 219; *De Forrest v. Hunt*, 8 Conn. 185; *Russell v. Copp*, 5 N. H. 154; *Harrison v. Handley*, 1 Bibb, 443; *Bell v. Rowland*, Hard. 301 [3 Am. Dec. 729]; Angell on Limitations, sec. 231, and note.

Reliance is placed in this case mainly upon the defendant's letter of the 4th of August, 1863, — the two earlier letters of the defendant amounting only to offers on his part to pay cer-

tain sums in satisfaction of his note. That letter does not amount to such an acknowledgment as is contemplated by the statute. It does not contain a direct acknowledgment—an express admission—that the amount of the judgment is due, or that he is willing to pay it.

It may be said that there is that sort of an implied acknowledgment that may be inferred in the case of every offer or promise, that the amount offered to be paid or promised to be paid is or will become due; but it is not the acknowledgment required by the statute, and it is of no avail to the plaintiff, because no promise arises therefrom by implication. It would be illogical to infer from an offer or promise to pay a given sum of money upon the original contract an acknowledgment, to infer a promise more comprehensive than that from which the acknowledgment was implied. An offer or promise to pay a certain sum, or deliver any article of value at a specified time, in satisfaction of the original debt upon which the statute has run, cannot, by this inverse implication, be construed as evidence of a promise to pay the whole debt, without a plain perversion of the meaning and intention of the provision of the statute.

The plaintiff claims that the letter proves the alleged new promise, while the defendant contends that it amounts only to an offer to pay certain sums at specified times, or at most, that it is a conditional promise. If it be an offer, the plaintiff cannot recover without showing an acceptance on his part; and if it be a conditional promise, the plaintiff must show a performance of the condition on his part, by the entry of satisfaction of the judgment recovered in 1852: Angell on Limitations, sec. 235. But for the purposes of this appeal, it is not requisite that we should give construction to the letter in this respect; for if it amounts to a new promise, the promise is to pay \$350 on demand, \$350 one year from the first payment, and \$400 two years from that time.

This evidence does not correspond with the allegations of the complaint,—of a promise generally to pay the amount of the judgment; nor does it sustain the findings.

Judgment reversed, and the case remanded for a new trial.

SAWYER, C. J., concurring. I concur in the judgment, and in the views expressed in the opinion. I also think that the only promise found in the letters of the defendant is conditional, and that there is no intent or willingness to pay, even

to the extent as to amount and terms of the promise, without a previous performance by the plaintiff of the conditions indicated, viz., a discharge of the judgment of record in Illinois, and a surrender to the defendant of the instrument upon which the judgment was obtained. An anxiety and persistent determination to accomplish this purpose, as a condition of the promise, is clearly manifest in all the letters of the defendant. There is no evidence of the performance of these conditions, and the conditional promise, without such performance, is ineffectual to take the case out of the bar of the statute.

STATUTE OF LIMITATIONS DOES NOT OPERATE TO EXTINGUISH DEBT, OR CREATE PRESUMPTION OF PAYMENT: *Pritchard v. Howell*, 60 Am. Dec. 363; *McCarthy v. White*, 82 Id. 754.

CAUSE OF ACTION IS FOUNDED UPON NEW PROMISE, and not upon the original contract, where the creditor relies upon a new promise after the statute of limitations has run upon the original contract: *Coles v. Kelsey*, 47 Am. Dec. 661, and note; *Martin v. Broach*, 50 Id. 306, 315, and note. The principal case is quoted in *Chabot v. Tucker*, 39 Id. 438, as overruling *Smith v. Richmond*, 19 Id. 476, on this point. The moral obligation of the original contract is a sufficient consideration to support the new promise: *Womack v. Womack*, 58 Am. Dec. 119; *Pritchard v. Howell*, 60 Id. 363. The principal case is quoted to this effect in *Wells v. Harter*, 56 Cal. 344.

ACKNOWLEDGMENT, WHEN SUFFICIENT TO TAKE CASE OUT OF OPERATION OF STATUTE OF LIMITATIONS: See *Richardson v. Thomas*, 74 Am. Dec. 636; *Harlan v. Bernie*, 76 Id. 428, and the notes thereto. The acknowledgment must be a direct and unqualified admission of an existing debt which the party is willing to pay: *Biddell v. Brizolara*, 56 Cal. 382; it must be clear, explicit, and direct to the point that the debt is due: *Wilcox v. Williams*, 5 Nev. 216, both citing the principal case.

LICK v. MADDEN.

[36 CALIFORNIA, 208.]

CLERK OF COURT IS BOUND TO ISSUE WRITS OF ATTACHMENT IN ORDER IN WHICH THEY ARE DEMANDED; but if the party who makes the prior demand is not in attendance to receive his writ when ready, the clerk is not bound to delay the issuing of other writs against the same party which may have been demanded in the mean time.

CLERK OF COURT IS BOUND TO ISSUE WRIT OF ATTACHMENT TO NEXT COMER, after having prepared for delivery the writ first demanded; and if in such case the first-comer is not present to receive his writ when prepared, and the next comer obtains his writ first, and thus acquires a priority, the clerk is not liable for a loss sustained thereby to the first-comer.

CLERK OF COURT IS GUILTY OF TECHNICAL BREACH OF OFFICIAL DUTY IN FIRST ISSUING WRIT OF ATTACHMENT SECONDLY DEMANDED; but if he

has the writ first demanded prepared and ready for delivery when it is called for, he is not liable for the damages sustained by the first party because the second obtains the first levy.

FINDING OF COURT BELOW WILL NOT BE DISTURBED BY SUPREME COURT, where there is a substantial conflict in the evidence, although the supreme court may be of the opinion that there is a preponderance of evidence against the finding.

PUBLIC OFFICERS SHOULD BE MADE TO ANSWER IN DAMAGES TO ALL PERSONS who may have been injured through their malfeasance, omission, or neglect; but if the damages would have been sustained notwithstanding the malconduct of the officer, or if the injured party has by his fault or neglect contributed to the result, the officers cannot be held responsible.

ACTION upon the official bond of the defendant. The facts are stated in the opinion.

George Cadwalader, for the appellant.

Moore and Alexander, for the respondents.

By Court, SANDERSON, J. This is an action upon the official bond of the defendant Madden, to recover damages sustained on account of his failure to perform his duty while holding the office of clerk of the district court of the sixth judicial district, in the matter of issuing a writ of attachment, at the suit of the plaintiff against the Lady Adams Company. The case has been here before, and will be found reported in the twenty-fifth volume of the reports of this court, at page 202. It then came up upon a judgment in favor of the defendants, based upon a demurrer to the complaint for insufficiency. The *gravamen* of the action was that the plaintiff, on a day named, filed in the office of defendant Madden a complaint in an action by him against Lady Adams Company, accompanied by an affidavit and an undertaking for an attachment, and demanded a summons and a writ of attachment forthwith. That thereafter Eggers & Co. also filed a complaint, affidavit, and undertaking in an action by them against Lady Adams Company, and demanded a summons and attachment forthwith. That notwithstanding the prior right of the plaintiff, the defendant Madden issued process in the latter action first, and delivered the same to the attorney of Eggers & Co., whereby Eggers & Co. were enabled to secure a levy upon the property of Lady Adams Company in advance of the plaintiff, and that, by reason of the premises, the plaintiff lost the greater part of his claim. We then held that it was the official duty of the defendant Madden to have issued

the attachments in the order in which they were demanded, and that his failure to do so was actionable under the statute in relation to the duties of county clerks (Stats. 1850, p. 262, sec. 9), and also at common law, and that the complaint was therefore sufficient. We accordingly reversed the judgment, and remanded the case with leave to answer. A trial upon the merits has since been had, resulting in favor of the defendants; and the case now comes here on an appeal from the judgment and an order denying the plaintiff's motion for a new trial.

The case was tried without a jury, and the court found that the plaintiff's action against Lady Adams Company was commenced at twenty minutes before two o'clock P. M. of the 10th of January, 1861, by depositing in the office of the defendant Madden a complaint, affidavit, and undertaking, with a request that a summons and attachment be issued forthwith; that thereupon the plaintiff's attorney, by whom the complaint, affidavit, and undertaking had been filed, and a summons and attachment demanded, left Madden's office, and was absent forty-five minutes; that on his return the writs which he had demanded had been completed, and were immediately thereafter, and without delaying him, placed in his hands; that in the mean time, and while the clerk was engaged in preparing the plaintiff's writs, the attorney of Eggers & Co. came into the office and placed in his hands a complaint, affidavit, and undertaking in an action by Eggers & Co. against Lady Adams Company, and also demanded a summons and attachment forthwith; that he (the attorney of Eggers & Co.) was directed to fill out the blanks, and did so; that thereupon the clerk signed, sealed, and delivered the same at three minutes before two o'clock, and at two o'clock the same were placed by the attorney of Eggers & Co. in the hands of the sheriff; so that the attachment of Eggers & Co. was issued and placed in the hands of the sheriff twenty-five minutes before the plaintiff's attorney returned to the clerk's office.

While a clerk is bound to issue writs in the order in which they are demanded, yet, if the party who makes the prior demand is not in attendance to receive his writ as soon as they are ready for delivery, he is not bound to delay the issuing of other writs against the same party which may have been demanded in the mean time. On the contrary, such delay would not admit of legal justification. Having prepared for delivery the writs first demanded, he is bound, notwithstanding the

absence of the party by whom they have been demanded, to proceed with reasonable diligence to comply with the demand of the next comer; and if the writs of the latter are ready before the former calls for his, he is nevertheless bound to deliver them as soon as they have been prepared. If in such a case the first-comer loses his priority, such loss is due, as the case may be, to his own negligence or misfortune.

If, however, as is found in this case, the clerk first issues the writ secondly demanded, he is doubtless, in any event, guilty of a technical breach of his official duty, but if notwithstanding such breach he has the writ first demanded prepared and ready for delivery when it is called for, we are unable to perceive how the party by whom it was demanded has been injured by the breach. The fact that sufficient time has elapsed to enable the clerk to prepare both writs and deliver the second before the first is called for, shows that had he strictly followed the line of his duty, and prepared the writs in the order in which they were demanded, the delivery of the second writ would have been likewise consummated before the first was called for. Such being the case, we think it clear, upon the findings, that the loss to the plaintiff of the first lien upon the goods of Lady Adams Company was not due to the omission of the clerk in not completing his writ before issuing that of Eggers & Co. Had, however, the plaintiff's attorney returned before sufficient time had elapsed to enable the clerk to issue and deliver both writs, the contrary result would have followed; and it is claimed on the part of the appellant that such was the fact, and that the finding of the court in that respect is contrary to the evidence.

There were four witnesses who testified upon this point,—the attorney of the plaintiff, Woods, his clerk, and Coffee and Barrett, both deputies of the defendant Madden, the former being the person by whom the writs in question were both issued. Under the well-settled and uniform rule of this court we can look into their testimony only for the purpose of determining whether there is a substantial conflict. If there is, we cannot disturb the finding of the court below, notwithstanding we may be of the opinion that there is a preponderance against the finding; for, unlike the court below when trying a cause without a jury, we possess none of the functions of a jury, and therefore are not allowed to substitute our opinion in the place of his, and declare to which side the testimony inclines.

The attorney of the plaintiff testified that "Coffee was just completing his attachment when he returned to the clerk's office"; that "not more than two minutes elapsed between his return to the clerk's office and the deposit by him of his attachment in the hands of the sheriff," whose office, as the case shows, was in another room in the same building, but whether near the clerk's office or remote from it does not appear.

Woods testified "that he was in the clerk's office when the attorney of Eggers & Co. came in; that the latter said something to Coffee which he (Woods) did not hear, and after waiting a few seconds went out; that shortly after the attorney of the plaintiff came in and asked if the papers in the Lick case were ready, and was told by Coffee that they were not, but would be in a minute or two; that the attorney of Eggers & Co. then came in, and the attorney of the plaintiff remarked to him, 'I am ahead of you this time,' to which the attorney of Eggers & Co. replied with a smile, 'I have the first levy'; that the attorney of the plaintiff then took his papers and went to the sheriff's office, and soon returned greatly excited."

Coffee testified, in substance, "that while he was engaged upon the plaintiff's papers the attorney of Eggers & Co. came to him with his papers already prepared and requested him to sign and seal them, and that he did so; that the attorney of Eggers & Co. then left the office with the papers; that the attorney of the plaintiff was absent about an hour, time enough to make out the papers in both cases; that the papers in the plaintiff's case were made out when his attorney returned, and had been ready for him probably three quarters of an hour before he returned."

Barrett, who had come into the office after the departure of the attorney of Eggers & Co., and before the return of the plaintiff's attorney, testified "that the plaintiff's papers were not made out when his attorney returned; that he (Barrett) signed the summons"; but he does not state whether he signed the summons before or after the return of the plaintiff's attorney. The testimony of Barrett as to the signing of the summons was corroborated by the summons itself, which was produced.

Here is a direct and substantial conflict upon the precise point whether the attorney of the plaintiff was absent long enough to enable the clerk to make out and deliver both sets of papers. It may be, as claimed by the learned counsel for

the appellant, that the finding of the court is contrary to the weight of this testimony, but it cannot be denied but that there was some evidence which sustains the finding. Of the credibility and weight of this evidence, the court below, acting as a jury, was the sole judge. To set aside his finding because we might have found the other way had we occupied his place, would be to substitute our judgment for his upon a question of fact, which, as this court has uniformly held, we are not allowed to do.

Taking, then, the finding of the court, so far as our action is concerned, as a true statement of the facts, we think the act complained of worked no legal damage to the plaintiff, assuming that he sustained a loss by his failure to obtain the first levy. That public officers should be held to a faithful performance of their official duties, and made to answer in damages to all persons who may have been injured through their malfeasance, omission, or neglect, to which the persons injured have in no respect contributed, cannot be denied. But it is equally true that if the result complained of would have followed notwithstanding their misconduct, or if the injured party himself contributed to the result in any degree by his own fault or neglect, they cannot be held responsible. If the position of the injured party would have been just the same had not the alleged misconduct occurred, he has no legal ground of complaint; and if his own conduct or the conduct of his attorney contributed to the result, he is *in pari delicto*, and the law leaves him where it finds him.

The following cases will be found to bear more or less directly upon the question considered in this opinion: *Zeigler v. Commonwealth*, 12 Pa. St. 227; *Governor v. Ridgway*, 12 Ill. 14; *Carpenter v. Sloane*, 20 Ohio, 327; *Governor v. Wiley*, 14 Ala. 172; *Gerald v. Bunkley*, 17 Id. 176; *Bevins v. Ramsey*, 15 How. 179; *McNutt v. Livingston*, 7 Smedes & M. 641; *Jenner v. Joliffe*, 9 Johns. 381; *Tracy v. Swartwout*, 10 Pet. 80; *Brown v. Lester*, 13 Smedes & M. 392; *Parks v. Davis*, 16 Iowa, 20.

Under the foregoing view the remaining questions become immaterial.

Judgment and order affirmed.

SPRAGUE, J., dissented.

OFFICER'S LIABILITY TO INDIVIDUAL FOR FAILURE TO PERFORM PUBLIC DUTIES: See *Robinson v. Chamberlain*, 90 Am. Dec. 713, and note considering the question; and see, particularly on the liability of the clerk of a court, *McAlister's Adm'r's v. Scrice*, 27 Id. 504. The principal case is cited in *Boardman v. Hayne*, 29 Iowa, 346, to the point that while a public officer should be made to answer to one who is injured through his malfeasance, omission, or neglect, he is not responsible if the damages would have been sustained, notwithstanding such misconduct, or if the injured party had by his own fault or neglect contributed to the result.

MOON v. ROLLINS.

[26 CALIFORNIA, 333.]

ONE WHO FIRST TAKES POSSESSION OF LAND MAKES IT HIS BY OCCUPANCY as against all the world except the true owner; and the land remains his as against all persons entering afterwards without his consent, and without title, unless he abandons it, or it is taken from him by some method known to the law.

ABANDONMENT IS QUESTION OF INTENTION, to be determined from the evidence.

ABANDONMENT OF LAND DOES NOT OCCUR if the person in possession leaves it with the intention of returning. An abandonment takes place only when one in possession leaves with the intention of not again resuming possession.

MERELY LAPSE OF TIME DOES NOT CONSTITUTE ABANDONMENT; but it is only a circumstance to be considered for the purpose of ascertaining the intention of the parties.

AFTER TITLE BY PRIOR POSSESSION IS ONCE SHOWN, THERE IS NO PRESUMPTION OF ITS LOSS; but an abandonment must be made to appear affirmatively by the party relying on it to defeat a recovery.

JUDGMENT WILL NOT BE REVERSED FOR ADMISSION OF ERRONEOUS TESTIMONY, if the appellant has suffered no injury from its admission.

JUDGMENT FOR POSSESSION OF LAND, AND PROCEEDINGS UNDER IT PUTTING PLAINTIFF IN POSSESSION, ARE RELEVANT on the question of the plaintiff's possession, and admissible in a subsequent action by him to recover possession of the same land against another person who entered upon the land after such judgment was recovered.

ACTION to recover the possession of a lot of land 113 feet by 131 feet, on the southwest corner of Mission and Ninth streets, in the city and county of San Francisco. A block of land, including the land in question, had been conveyed June 14, 1851, by a party in possession, one Kisling, to one William P. Humphreys, who, two days afterwards, conveyed it to George C. Sindle. These deeds were recorded July 26, 1853. In 1853, certain persons, Michael Nolan and Patrick Donnellan, took possession of a lot twenty-five feet front on Mission Street, in about the center of the premises in dispute, and put a fence

around the same. In the fall of 1853, one Peter McKenna went into possession of this lot, claiming it under a deed from Nolan and Donnellan. On November 9, 1853, Sindle brought an action against McKenna to recover the entire block, and on March 9, 1854, recovered judgment against him. A writ of possession was issued, and the sheriff returned that he had put Sindle in possession. While this action was pending, Sindle conveyed the block in undivided shares to several persons; and after the sheriff had executed the writ of possession, these grantees made partition, the premises in question falling to the share of Joseph Lampson. Lampson never lived on the premises. The grantees made a settlement with McKenna, giving him a deed to the twenty-five-foot lot on Mission Street, and McKenna took possession of the same. In 1855 a judgment was recovered against Lampson by a resident of New York, under which the premises in question were sold to the judgment creditor. The premises were conveyed from time to time, under this sale, for considerable sums of money; and in October, 1863, they were conveyed to the plaintiff, George C. Moon. In 1861, the defendant, William Rollins, took possession of the premises. Rollins claimed to own the twenty-five-foot lot on Mission Street, under a deed from McKenna. There was evidence to show that he had recognized the right of the plaintiff's grantors in the remaining part of the premises in dispute, and had requested the plaintiff to unite with him in making a purchase thereof. The plaintiff accordingly borrowed the money, the loan being negotiated by the defendant; but the defendant then refused to join with the plaintiff, and claimed the whole property. McKenna died some years before the trial of this action. Certain testimony of the plaintiff was objected to by the defendant as incompetent, but was admitted by the court. The judgment, and proceedings under it in the action by Sindle against McKenna, were also admitted by the court, against the objection of the defendant. The court found that the plaintiff was the owner and entitled to the possession of the premises demanded, with the exception of the twenty-five-foot lot on Mission Street, and gave judgment accordingly for possession, and for damages for withholding the same. The defendant relied principally upon the abandonment of the premises by the plaintiff.

R. R. Provines, for the appellant.

B. S. Brooks, for the respondent.

By Court, SAWYER, C. J. The first point made is, that the evidence is insufficient to justify the findings, in several particulars specified. We do not think we should be justified in setting aside the findings on this ground.

In *Richardson v. McNulty*, 24 Cal. 345, we said, on the question of title by possession and of abandonment: "By the act of occupancy, the plaintiff made it his, and manifested his intention to do so. Once his, it continues his until he manifests his intention to part with it in some manner known to the law. He may sell it, or give it to another, or transfer it in any other mode authorized by law (thereby preserving the continuity of possession), or he may abandon it. In doing the latter, he must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess it or reclaim it for himself in any event, and regardless and indifferent as to what may become of it in the future. When this is done, a vacancy in the possession is created, and the land once more reverts to its former condition, and becomes once more *publici juris*, and then, and not until then, an abandonment takes place." So in *St. John v. Kidd*, 26 Id. 272, we said: "Whereas the principal question involved in the defense of abandonment is one of intention, was the ground left by the locator without any intention of returning or making any further use of it?"

In *Lawrence v. Fulton*, 19 Cal. 683, the court substantially held that lapse of time does not of itself constitute an abandonment, but that it is only a circumstance for the jury to consider in determining the question whether there was an abandonment; or in other words, the question is one of intent. So in *Waring v. Crow*, 11 Id. 369, where the district court instructed the jury that, on a question of abandonment, "the intention alone governs," and that if the party in possession "left with the intention of returning, he might do so at any time within five years, provided there was no rule, usage, or custom of miners of such notorious character as to raise a presumption of an intention to abandon." This was held, on appeal, to "present the law fairly and clearly to the jury": Id. 372. It was only necessary for the purpose of the case to go so far, and nothing was said as to a period of time beyond five years. But if a party may return in five years, it is not apparent why he may not return in five years and one month, or two months, unless an adverse possession has barred the right of entry. It is a question of intention, and has been so held over and over again, and not a question of time, except

so far as the jury are entitled to consider lapse of time in connection with other circumstances of claim or non-claim, and acts of ownership and dominion, or a want of such acts, for the purpose of ascertaining the intention.

In *Keane v. Cannovan*, 21 Cal. 293 [82 Am. Dec. 738], the plaintiff's grantor had been in possession up to January, 1851, when his building was burned, and it does not appear that he ever afterwards occupied or even fenced it. In fact, it does appear that he was not in possession after the summer of 1852. The action was commenced in 1860, some nine years after the fire. The district court charged the jury that the question before them was one of prior possession, as neither party showed title; that if they found a prior possession in said plaintiff's grantor, it was sufficient to maintain the action, unless abandoned; "that the question of abandonment was one of intention, of which they were to judge exclusively." Plaintiff had judgment, and on appeal the court, by Mr. Chief Justice Field, say: "The charge to the jury on the subject of abandonment was correct. The charge was, that the question of abandonment was one of intention, of which the jury was to judge exclusively, and that in order to do so they must take into consideration all the facts and circumstances before them. The question was correctly stated; it was plainly one of intention to be gathered from the facts. There was little evidence on the subject, none from which the court would have been warranted in taking it from the jury. There are cases undoubtedly in which an abandonment may be inferred from the lapse of time, and the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises. But in such cases the leaving of the premises must have been voluntary, and without any expressed intention to resume the possession. In the case at bar, it appears that when Mondolet ceased to occupy in person the premises, he left an agent in charge of them. This circumstance is of itself sufficient to rebut the presumption of abandonment arising from the fact that he ceased to occupy them, and to render the question whether in fact he did or did not abandon them one for the consideration of the jury." And on petition for rehearing, the court say: "The possession of Mondolet was evidence of seisin in fee in him, and no further or higher evidence of title was required to enable the plaintiff, claiming through him, to recover until the defendant had shown an anterior possession, or had

traced title from a paramount source." It must also be remembered that after title by possession is once shown, there is no presumption of its loss, but an abandonment must be made to appear affirmatively by the party relying upon it to defeat a recovery. Thus it has been uniformly held, down to and including *Bell v. Bedrock Tunnel and Mining Company*, 36 Cal. 214, that abandonment is a question of intention to be ascertained by the jury from a consideration of all the circumstances of the case. And "upon a question of abandonment a wide range should be allowed, for it is generally only from facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove any fact or circumstance from which any aid for the solution of the question can be derived": *Willson v. Cleaveland*, 30 Cal. 202. Upon an examination of the cases cited, it will be found that slight circumstances have been allowed to rebut the inference of abandonment arising from long disuse.

In this case there was evidence amply sufficient to show a possession once acquired by plaintiff's grantors, and the court so found. There was then left only the question of abandonment, and on this question also the court found in favor of plaintiff, on a better case for plaintiff than was presented in *Keane v. Cannovan*, 21 Cal. 293 [82 Am. Dec. 738], and amply sufficient to prevent us from setting aside the finding on that point. The land was conveyed from time to time for large sums of money, — as high as fifteen hundred dollars, — sometimes through sales under execution, and sometimes on sales by the owner. The plaintiff himself paid a large sum of money for the land, and only obtained it after a long correspondence and negotiation with the party claiming to be the owner in New York. These facts indicate no purpose to abandon. The claim asserted was evidently well known and respected till defendant entered. There is also evidence tending strongly to show that defendant himself recognized the right of plaintiff's grantors, and that the purchase was made by plaintiff upon an arrangement with defendant, with money borrowed by plaintiff for the express purpose upon a loan negotiated by defendant himself, and that defendant, in taking possession, acted in bad faith toward plaintiff. There is, it is true, conflicting testimony upon this point, but the finding upon the whole case is for the plaintiff, and we find no sufficient ground for setting aside the findings on the questions litigated of prior possession and abandon-

ment. An intent to abandon was certainly not affirmatively shown. Unless we are prepared to overthrow the doctrine that abandonment is a question of intention to be determined by the jury from the evidence, and to overrule the cases cited, the judgment in this case must be affirmed on this point.

Defendant, Rollins, derived title to a part of the land claimed in the complaint from one McKenna, who died some years before the trial. The testimony of plaintiff, Moon, was objected to as incompetent, on the ground that Rollins is the representative of a deceased party. But the court found in favor of defendant, Rollins, as to the McKenna lot. Conceding Moon to be incompetent to testify, so far as that lot is concerned, since Rollins succeeded as to that lot, he could not have been injured by Moon's testimony with respect to it. It is not pretended that Rollins is the representative of a deceased party, with respect to the lots recovered by Moon, and as to those he was a competent witness.

We think there is no error on the question of damages.

The judgment in the case of *Sindle v. McKenna*, and the proceeding under it, putting the plaintiff in possession, were relevant on the question of possession, to show the fact that he was put in possession.

Judgment affirmed.

SPRAGUE, J., expressed no opinion.

ABANDONMENT IS QUESTION OF INTENTION, to be determined by the jury: Note to *Wyman v. Hurlburt*, 40 Am. Dec. 464; *Keane v. Cannovan*, 82 Id. 738; *Mallett v. Uncle Sam G. & S. M. Co.*, 90 Id. 484. The principal case is cited to this point in *Myers v. Spooner*, 55 Cal. 261.

ABANDONMENT, LENGTH OF TIME ESSENTIAL TO: See note to *Wyman v. Hurlburt*, 40 Am. Dec. 465; *Eads v. Brazellon*, 79 Id. 88; *Keane v. Cannovan*, 82 Id. 738; *Mallett v. Uncle Sam G. & S. M. Co.*, 90 Id. 484.

THE PRINCIPAL CASE IS REFERRED TO in *Lamb v. Davenport*, 1 Saw. 621, on prior occupancy as giving a provisional title to lands.

WRIGHT v. RYDER.

[86 CALIFORNIA, 342.]

AGREEMENT IN GENERAL OR TOTAL RESTRAINT OF TRADE IS VOID, although it be founded on a legal and valuable consideration; but an agreement in partial restraint of trade, restricting it within certain reasonable limits, or confining it to particular persons, if founded on a good and valuable consideration, is valid.

AGREEMENT IN RESTRAINT OF TRADE THROUGHOUT ENTIRE AREA OF STATE IS UNREASONABLE AND VOID, as against public policy.

COVENANT APPLIES NOT ONLY TO EXISTING ROUTES OF TRAVEL, but to all new routes afterwards opened, where it is not to run or employ, or suffer to be run or employed, a certain steamboat "upon any of the routes of travel on the rivers, bays, or waters of the state of California for the period of ten years."

COVENANT BY VENDEE WITH VENDOR OF STEAMBOAT IS IN UNREASONABLE RESTRAINT OF TRADE AND VOID, where it is that the vendee will not run or employ, or suffer to be run or employed, such boat "upon any of the routes of travel on the rivers, bays, or waters of the state of California for the period of ten years."

ACTION by George S. Wright against James M. Ryder to recover the sum of twenty-two thousand five hundred dollars, and to compel the defendant to execute his promissory note to the plaintiff for forty-one thousand dollars, and a mortgage of the steamboat New World, and of her machinery, to secure the payment thereof. The complaint alleged that on July 16, 1868, the plaintiff, being the owner of the steamboat New World, and of her machinery, entered into an agreement with the defendant, by which the plaintiff was, within twenty days, to deliver the boat and her machinery to the defendant, and to execute and deliver to the defendant a bill of sale thereof, and the defendant was to pay the plaintiff therefor twenty-two thousand five hundred dollars, in gold coin, and to execute and deliver to the plaintiff his promissory note for forty-one thousand dollars, and a mortgage of the boat and of her machinery to secure the same; that upon the twentieth day after making the said agreement, the plaintiff tendered the defendant possession of the boat and her machinery, a bill of sale duly executed by the plaintiff, and a note and mortgage to be executed by the defendant; and that the defendant accepted the boat and bill of sale, but refused to pay the money or to execute the note and mortgage in accordance with the agreement. The answer alleged that on May 2, 1864, the California Steam Navigation Company, being engaged in navigating the waters of California, sold the steamboat New World and her machinery to the Oregon Steam Navigation Company, and in part consideration of the sale, the Oregon Steam Navigation Company agreed for themselves, their successors and assigns, "that they will not run or employ, or suffer to be run or employed, the steamboat New World upon any of the routes of travel on the rivers, bays, or waters of the state of California for the period of ten years from the first day of May, 1864," and "that the machinery of the said steamboat New World shall not be

run, or employed in running, any steamboat, vessel, or craft upon any of the routes of travel on the rivers, bays, or waters of the state of California for the period of ten years from the first day of May, 1864"; that on February 18, 1867, the Oregon Steam Navigation Company executed and delivered to Henry Winsor a bill of sale of the steamboat and machinery, containing an agreement by Winsor "that said steamboat or vessel is not within ten years from the first day of May, 1867, to be run upon any of the routes of travel on the rivers, bays, or waters of the state of California, or the Columbia River and its tributaries; and that during the same period last aforesaid, the machinery of the said steamboat shall not be run, or employed in running, any steamboat or craft upon any of the routes of travel on the rivers, bays, or waters of the state of California, or the Columbia River and its tributaries"; that in consideration of the sale, Clavrick Crosby, Henry Winsor, Nathaniel Crosby, and Calvin N. Hale executed and delivered to the Oregon Steam Navigation Company a bond conditioned for the performance of the agreement, the bond reciting that the obligors were joint purchasers of the steamboat and machinery; that on March 7, 1867, Winsor executed and delivered to Hale a bill of sale of the vessel and machinery, the bill of sale containing no provision or condition; that on November 23, 1867, the obligors of the bond, except Hale, executed and delivered to the plaintiff and Duncan B. Finch a bill of sale of the vessel and machinery, the bill of sale containing no condition; that Wright and Finch, at the time, knew of the agreements of Winsor and the Oregon Steam Navigation Company; that on November 23, 1867, Hale executed and delivered to Finch a bill of sale of the vessel and machinery, the bill of sale also containing no condition; that on June 30, 1868, Finch sold and transferred the boat and machinery to the plaintiff, the bill of sale likewise being without condition; and that the defendant at the time of purchase, and until August 10, 1868, when he offered to return the boat and her machinery to the plaintiff, was ignorant of the provisions in the bills of sale to the Oregon Steam Navigation Company and to Winsor. The plaintiff demurred to the answer, the demurrer was sustained, and judgment thereupon rendered for the plaintiff. The defendant appealed.

B. S. Brooks, for the appellant.

Patterson, Wallace, and Stow, for the respondent.

Wilson and Crittenden, for the Oregon Steam Navigation Company.

By Court, CROCKETT, J. There are but two points presented on this appeal for our decision, to wit: 1. Whether or not the covenants of the Oregon Steam Navigation Company to the California Steam Navigation Company, and the conditions in the bill of sale from the Oregon Steam Navigation Company to Winsor, and the bond of Winsor and others to said last-named company, are void, as being in restraint of trade and against public policy; and 2. If they be conceded to be valid, whether or not they can be enforced as against the defendant, or against the steamer *New World* in his hands.

The general principles which govern contracts in restraint of trade are well settled, both in England and the United States. They proceed on the theory that the public welfare demands that private citizens should not be allowed, even by their own voluntary contracts, to restrain themselves unreasonably from the prosecution of trades, callings, or professions, or from embarking in business enterprises in the promotion and encouragement of which the public has an interest. At an early period in English jurisprudence, when trade and the mechanic arts were in their infancy, it was deemed a matter of the greatest public importance to encourage their growth, and to prohibit contracts which tended to abridge them. Hence the rule first established was, that all contracts were void which in any degree tended to the restraint of trade, even in a particular circumscribed locality, either for a definite or unlimited period. But as population and trade increased, and there was consequently a greater competition in all useful pursuits, the necessity for the stringent rule which before prevailed had in a greater measure ceased, and the rule itself was greatly relaxed and modified. Instead of denouncing as void all contracts in restraint of trade, the rule as relaxed tolerated such as were restricted in their operations within reasonable limits. Hence it has been repeatedly decided, both in England and America, that whilst a contract by an artisan not to follow his calling at any time or place was an unreasonable restraint upon trade, contrary to public policy, and therefore void, nevertheless if he contracted for a valuable consideration not to pursue his occupation within certain reasonable, restricted limits, the contract was valid, and would be enforced. Thus in *Alger v. Thacher*, 19 Pick. 51 [31 Am.

Dec. 119], the defendant had entered into a bond by which he bound himself not to carry on the business of an iron founder at any time or place, and the court held the contract to be void, as an unreasonable restraint upon trade. This is a leading case on that point. So in *Keeler v. Taylor*, 53 Pa. St. 468, 469, the court says: "But if the restraint be general, that is, not limited to a reasonable time and district, it is void at law, and of course will not be enforced in equity." In Story on Contracts, section 550, the rule is thus stated: "An agreement in general or total restraint of trade is void, although it be founded on a legal and valuable consideration. . . . The same rule has been uniformly adhered to even to the present day; an agreement, therefore, not to carry on a certain business anywhere is invalid, whether it be by parol or specialty, or whether it be for a limited or for an unlimited time"; and he quotes, in support of the rule, *Mitchell v. Reynolds*, 1 P. Wms. 190; *Homer v. Ashford*, 3 Bing. 323; *Pierce v. Fuller*, 8 Mass. 223 [5 Am. Dec. 102]; *Nobles v. Bates*, 7 Cow. 307; *Morris v. Coleman*, 18 Ves. 436; *Hinde v. Gray*, 1 Man. & G. 195; *Alger v. Thacher*, 19 Pick. 51 [31 Am. Dec. 119]; to which may be added many other authorities from the courts of England and America. "But," he adds (section 551), "an agreement in partial restraint of trade, restricting it within certain reasonable limits or times, or confining it to particular persons, would, if founded upon a good and valuable consideration, be valid. . . . Such an agreement not only does not obstruct trade, but is oftentimes requisite and necessary, as well for the advantage of the public as of the individual." This proposition is maintained in *Rannie v. Irvine*, 7 Man. & G. 976; *Chappel v. Brockway*, 21 Wend. 157; *Hartley v. Cummings*, 5 Com. B. 247; *Bunn v. Guy*, 4 East, 190; *Pierce v. Woodward*, 6 Pick. 206; *Perkins v. Lyman*, 9 Mass. 522; *Hayward v. Young*, 2 Chit. 407; *Mallan v. May*, 11 Mees. & W. 653; *Wickens v. Evans*, 3 Younge & J. 318.

In such cases, the difficulty lies in determining what are reasonable and what unreasonable restrictions in respect to the area within which the restriction is to be confined. If it be unlimited in space, and is to operate everywhere, nearly all the authorities agree that the contract is void; and a rule established by the English courts is, that if the restriction operates throughout the kingdom, the contract is void.

In this case, the covenant of the Oregon Steam Navigation Company to the California Steam Navigation Company is,

“that they will not run or employ, or suffer to be run or employed, the said steamboat *New World* upon any of the routes of travel on the rivers, bays, or waters of the state of California for the period of ten years from the first day of May, 1864.” There is a similar covenant that the machinery of the boat shall not be run, or employed to run, any vessel or craft on any of the routes of travel, or on the rivers, bays, or waters of this state for the same period. The covenant of Winsor and others to the Oregon company is even broader, and includes the waters of the Columbia River and its tributaries. These covenants, if valid, and enforced by the courts, would exclude the boat from all the navigable waters of California, and the principal navigable waters of Oregon, for the period of ten years. There is no force in the argument that the covenant to the California Steam Navigation Company applied only to the existing routes of travel, and not to new routes afterwards to be opened. As we construe it, the covenant applied to all routes of travel on the rivers, bays, or waters of the state then existing, or which should be established within the period limited. If the validity of these covenants was to be tested solely by the question whether the limitation of the area within which they are to operate was reasonable or otherwise, we should have no hesitation in pronouncing them unreasonable, and within the rule which holds such contracts to be void as against public policy. The covenants include the entire area of the state, and are therefore in this respect without limitation, within the meaning of the rule we have stated.

“Contracts which go to the total restraint of trade, as that a man will not pursue his occupation or carry on his business anywhere in the state, are void, upon whatsoever consideration they may be made”: *Chappel v. Brockway*, 21 Wend. 159; *Dunlop v. Gregory*, 10 N. Y. 244 [61 Am. Dec. 746]; *Homer v. Ashford*, 3 Bing. 328.

In nearly all the adjudged cases cited by counsel, the questions decided arose under contracts made by tradesmen or others following particular occupations, whereby they bound themselves not to pursue their occupations, either generally or within certain specified limits. But in this case, the question comes up in another aspect. The California Steam Navigation Company was largely engaged in navigating the waters of this state, and being the owner of the steamer *New World*, sold her to the Oregon Steam Navigation Company, upon an agreement that she was not, for the period of ten years, to be

employed in navigating the waters of this state. The object of this provision, obviously, was to prevent the *New World* from being employed as an opposition boat in competition with the boats of the California Steam Navigation Company, and counsel insist that such a transaction does not come within the rule which prohibits contracts in restraint of trade. The argument is, that being the owner of the boat, the California Steam Navigation Company had the lawful right to withdraw her from commerce entirely; and if they elected to do so, might have permitted her to rot at the dock, or have otherwise destroyed her, in which event the public could not have complained, even though a great public inconvenience may have resulted from such conduct on the part of the company.

From the fact that the company, as owner, had this absolute power of disposition, the inference is drawn that it might impose whatever limitations it pleased on the future use of the boat; that it might have imposed it as a condition of the sale that the boat should be taken to pieces, and its machinery destroyed, and consequently, that it was competent for it to require that the boat should not thereafter run in a particular trade. But precisely the same argument would apply to a tradesman who stipulates not to follow his trade at any time or place. He may elect to abandon his calling altogether, however urgently the public may demand his services, or he may voluntarily disable himself from pursuing his vocation, and thus deprive the public of his services entirely. But, as we have seen, it does not thence follow that he is bound by a contract in which he stipulates that he will not pursue his avocation at any time or place.

The reason of the rule is, that though for the present he may intend and desire to abandon his trade or calling, as he has the right to do so, the law, on grounds of public policy, will not allow him to bind himself not to resume his avocation if he shall afterwards elect to do so. So, while the owner of a steamboat has the right to keep her idle, or to destroy her if he choose, however great may be the inconvenience to the public, it does not follow that he would be bound by a contract in which he stipulates never to employ her in the waters of this state. He might afterward change his mind and desire to engage in commerce with her in our waters, and on grounds of public policy he would not be bound by his contract. But we have grave doubts whether, in this age of abundant capital and active competition in all the avenues of commerce, the

withdrawal of a single boat from our navigable waters could be deemed an appreciable restraint upon trade, or result in the slightest inconvenience to the public. The difficulty lies in fixing the line between that which is or is not an appreciable restraint of trade. If the California Steam Navigation Company, which now occupies our bays, rivers, and inlets with its fleet of steamboats, should suddenly convey them all to a purchaser on condition that they were not to be employed in navigating any of the waters of this state for a period of ten years, no one could doubt that this would operate as a great present calamity to the public, and the condition would be void as a restraint upon trade. On the other hand, if a sloop or schooner of fifty tons burden should be sold on a similar condition, the injury to the public would be scarcely appreciable. In like manner, if all the carpenters and masons in a large city should bind themselves not to prosecute their business in this state for a period of ten years, it might produce great public inconvenience; whereas, if only one carpenter or mason should enter into a similar contract, the loss of his services might not be felt by the public. And yet, in the latter case, we would be bound by a long line of adjudications in England and America to hold the contract void, as in restraint of trade. The reasoning on which these decisions rest applies to the sale of a single boat as fully as to the case of a single tradesman; and we feel constrained, in deference to these decisions, to hold the contract in this case to be void. This view of the case renders it unnecessary to consider the second point raised on the appeal.

The judgment is therefore affirmed.

CONTRACTS IN RESTRAINT OF TRADE, VALIDITY OF: See *Angier v. Webber*, 92 Am. Dec. 748, and note fully discussing the subject. The principal case is cited in *More v. Bonnet*, 40 Cal. 254, to the point that a contract by which one of the parties binds himself not to engage in a certain business in the state is void; and in *Callahan v. Donnelly*, 45 Id. 153, S. C., 13 Am. Rep. 173, to the point that a contract by the vendors of a business of manufacturing yeast powder, that they would not engage in the manufacture of Donnelly's Yeast Powders, "nor in any branch of the yeast-powder business," is also in unreasonable restraint of trade and void. The contract between the Oregon Steam Navigation Company and Winsor, in the principal case, was upheld as valid in *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64; and as the restraint imposed by the contract was not larger than required for the necessary protection of the party in whose favor it was made, it is plain that within the principles announced in the note to *Angier v. Webber*, such is the correct conclusion. The principal case, we take it, is therefore wrongly decided. The prior case of *California Steam Navigation Co. v. Wright*, 65 Am. Dec. 511, decided by the California supreme court, is in better accord with authority.

WILSON v. WILSON.

[36 CALIFORNIA, 467.]

CALIFORNIA STATUTE OF LIMITATIONS OF 1850 DOES NOT RUN AGAINST MARRIED WOMAN DURING COVERTURE; but under the amendment of 1863 it runs against a married woman in all those actions to which her husband is not a necessary party plaintiff with her.

WIFE MAY MAINTAIN ACTION DURING COVERTURE AGAINST HUSBAND, in California, to recover money due upon a promissory note executed by the husband to the wife before marriage, and which is the separate property of the wife. The statute giving the husband the management and control of the separate property of the wife during marriage does not affect the right of the wife to bring such action.

IF HUSBAND MANAGES SEPARATE PROPERTY OF WIFE, he must manage it as her separate property; and she is entitled to enjoy the income, or the property itself, as separate property.

LIMITATION AS TO KIND OF ACTIONS THAT MAY BE MAINTAINED BY WIFE, when they concern her separate property, or are against her husband, does not exist in California.

ACTION on promissory notes. The facts are stated in the opinion.

J. H. Budd and L. T. Carr, for the appellant.

Coffroth and Spaulding, for the respondent.

By Court, SAWYER, C. J. On the 17th of September, 1856, the defendant, William Wilson, executed in favor of the plaintiff, Orpha Wilson, two promissory notes, for the sums of one thousand dollars and thirteen hundred dollars respectively, each payable five years after date. The notes consequently became due on the 20th of September, 1861, and a right of action then accrued, which had become barred by the statute of limitations, requiring an action to be commenced within four years, on the 22d of September, 1865, unless it was saved by some disability recognized by the statute existing at the time the right of action accrued. This suit to recover the amount due on said notes was commenced on the 1st of November, 1866, — more than a year after the expiration of four years from the maturity of the notes.

In the year 1857, before the maturity of the notes, plaintiff and defendant intermarried, and they have ever since been, and they now are, husband and wife, and residents of said state. The sum due and the notes are the separate property of the wife.

The complaint avers the facts stated. Defendant demurred, relying upon the grounds, — 1. That the cause of action is

barred by the statute of limitations; 2. That the facts stated do not constitute a cause of action in favor of the wife against the husband. The district court sustained the demurrer, and rendered judgment for defendant. Plaintiff appeals from the judgment.

Section 23 of the statute of limitations of 1850 provides that "if a person entitled to bring an action mentioned in the last preceding chapter [which includes the case in question] . . . be, at the time the cause of action accrued, either, first, within the age of twenty-one years, . . . or fourth, a married woman, the time of such disability shall not be a part of the time limited for the commencement of the action": Stats. 1850, p. 346, sec. 23. The fourth category of the twenty-third section was amended in 1863 by adding a clause, so that it now reads: "4. A married woman, and her husband be a necessary party with her in commencing such action": Stats. 1863, p. 326, sec. 5. As the provision now stands, the statute runs against a married woman, in all those actions to which her husband is not a necessary party with her in commencing the action, the same as against other parties. Under the act as it formerly stood, although a wife might sue alone with respect to her separate property under the seventh section of the practice act, and there was in fact no absolute disability to maintain such actions, yet coverture was recognized as a disability by the twenty-third section of the statute of limitations, so far as the purposes of that act are concerned. It as clearly excepted married women from the provisions of the act, while the coverture lasted, and where the cause of action accrued during coverture, as it did infants, insane persons, etc. And there is no more reason for confining the operation of the act by construction to those cases wherein it was necessary to join the husband, on the ground that there was no real disability in such cases under the act, than there is for taking infants out of the provision by some strained construction; for there is really no absolute disability to sue on the part of the latter. An infant could always sue; but he is required to appear by guardian instead of by attorney: Practice Act, sec. 7; *Fox v. Minor*, 32 Cal. 111.

At the time the notes in question matured and the cause of action accrued, the plaintiff was a married woman, and within the exception, and the time which subsequently elapsed till the adoption of the amendment in 1863 is not to "be a part of the time limited for the commencement of the action."

And section 6 of the amendatory act of 1863 also provides "that a person now laboring under a disability existing according to the provisions of the said act, to which this act is amendatory, but which is not held or declared a disability by this act, shall have five years after the passage of this act in which to commence such action or make such defense": Stats. 1863, p. 327, sec. 6. The plaintiff being one who, to avoid the statutory bar, was entitled to avail herself of her coverture, which was recognized by the former act as a disability for the purpose of that act, but which is not declared to be a disability under the amendatory act in those cases where the husband need not be joined, is within the provision cited, and her action was commenced within the time limited.

The other question, whether the wife during coverture can maintain an action against the husband to recover money due upon a note executed by him in favor of the wife before marriage, and which is the separate property of the wife, is a novel one. We are not aware that the question has ever before been presented for adjudication. It was held in New York by the supreme court of the third district, under the several recent acts authorizing married women to acquire and hold separate property, and to maintain suits for injuries either to her person or property, that she could not maintain an action against the husband to recover damages for an assault and battery: *Longendyke v. Longendyke*, 44 Barb. 366. But that is a different question from the one now presented. Our constitution provides that "all property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property": Const., art. 11, sec. 14. The act defining the rights of husband and wife contains a similar provision (sec. 1), but it also provides that "the husband shall have the management and control of the separate property of the wife during the continuance of the marriage": Sec. 6. And on this last provision respondent bases his sole objection to the maintenance of the action. It is said in argument that the husband has the management and control of the wife's separate property during coverture, and that it would be absurd to allow a recovery when he has the rightful possession and control, and if a recovery were had, he would still be entitled to the possession and control.

But if this provision of the statute is conceded to be con-

stitutional, we do not perceive that it necessarily affects the right of the wife to recover in this action. The debt is a debt due from the husband to the wife, incurred before marriage. It will be the separate property of the wife when recovered. The husband has never paid it. He refuses to pay, or recognize her right. He is not now managing and controlling the money due as the separate property of the wife. It has never come to her estate in that character. If the husband pays over the money to the wife, it must then be managed, even if the management be in the husband, as the separate property of the wife, and she would be entitled to enjoy the income, or the money itself, as separate property. Whereas now she is deprived of its use and enjoyment, because the debtor declines to pay it, or to place it in the category of the wife's separate estate. The suit may be necessary to ascertain the character of the property, or whether there is property in the hands of the husband which ought to be managed and disposed of as separate property. This is a question of indebtedness arising between two distinct and different estates. How is the wife to avail herself of the use of the property, or place it in the category of her separate estate, unless she can recover it from the debtor? The debtor claims that the statute of limitations is running against her. How is she to avoid the bar, if she cannot sue, and the debtor will not pay without suit? There is no provision to prevent the statute running in such case. Section 8 of the act defining the rights of husband and wife, which authorizes the appointment of trustees, may sometimes be a useful remedy in the case provided for, but we see no reason for supposing it to be the sole remedy. Besides, it does not cover all cases. The husband may manage the estate admirably, and commit no waste, yet deprive the wife of all enjoyment of its fruits. He may choose to hoard it rather than appropriate it to her present enjoyment. The provisions are very narrow in their scope.

But section 7 of the practice act authorizes the wife to sue alone "when the action concerns her separate property," and also "when the action is between herself and her husband." There is no limitation as to the kind of actions that may be maintained "between herself and her husband"; and section 395, as amended in 1865-66, authorizes the husband and wife to testify on their own behalf, or on behalf of each other, as witnesses in actions between themselves, except in actions of

divorce. This provision contemplates that there may be actions between husband and wife other than those relating to divorces. What are they, unless relating to rights of property? Disputes with respect to property may arise between them when the separate existence of the wife, and a separate right of property, is recognized at law, as in this state, as well as other matters; and when they do arise, there is as great necessity for a judicial determination of the questions as when they arise between other parties. A litigation of the kind between husband and wife may be unseemly and abhorrent to our ideas of propriety; but a litigation in one form can be no more so than in another, and no more so than the necessity itself which gives rise to the litigation. The present policy of the law is to recognize the separate legal and civil existence of the wife, and separate rights of property, and the very recognition by the law of such separate existence, and rights at law as well as in equity, to hold and enjoy separate property, involves a necessity for opening the doors of the judicial tribunals to her, in order that the rights guaranteed to her may be protected and enforced. The right to bring actions is accordingly recognized in the sections referred to, and no limitation is imposed as to the character of the actions. The contracts sued on were valid contracts at the time they were made. The marriage did not divest the wife of her debt. The law made it separate property. The husband fails and refuses to pay, and unless the wife can enforce payment in this action, she is without remedy, and she may never be able to enjoy the benefit of her property. Until the money is paid, the debt cannot be made available to the separate estate of the wife; and unless voluntarily paid, payment must be enforced by suit, or it will be lost. There is a right in favor of the wife and against the husband, as clearly recognized by the law as if the debt were due from a stranger. If there is a right, there must be a remedy. If the debtor were a stranger, this action could be brought by the wife alone. The right being the same as in the case of a stranger, we can perceive no reason why the remedy should not be the same, unless the law has provided otherwise; and we find no other provision adequate to the occasion, and no provision forbidding this remedy. We find the right of the wife to sue the husband expressly recognized, and the right is not limited to any particular action or class of actions. We think the suit properly brought, and that the facts stated in the complaint are suffi-

cient to constitute a cause of action in favor of the plaintiff against the defendant.

Judgment reversed, with directions to the district court to overrule the demurrer, with leave to defendant to answer in pursuance of the usual practice.

COVERTURE AS PREVENTING RUNNING OF STATUTE OF LIMITATIONS AGAINST MARRIED WOMAN: See note to *Moore v. Armstrong*, 36 Am. Dec. 69, where the subject is discussed; *Perkins v. Cartmell*, 42 Id. 753; *McDowell v. Potter*, 49 Id. 503; *Wellborn v. Weaver*, 63 Id. 235; *Fearn v. Shirley*, 66 Id. 575. The statute of limitations may be successfully invoked against a married woman in a case where coverture does not prevent her from suing: *Mauillon v. Cox*, 67 Cal. 390, citing the principal case.

WIFE MAY MAINTAIN ACTION AGAINST HUSBAND in California upon a promissory note executed by him to her before marriage: *Marlow v. Barlow*, 53 Cal. 460, citing the principal case. See further, as to the right of a wife to sue her husband, *Dougherty v. Snyder*, 16 Am. Dec. 520.

LONG v. NEVILLE.

[26 CALIFORNIA, 455.]

SHERIFF, CALLED UPON TO EXECUTE WRIT OF ATTACHMENT OR EXECUTION, MAY DEMAND INDEMNITY of the plaintiff in the writ, it seems, before he can be required to seize property in the possession of third persons claiming to be the owners; and if he is not indemnified on demand, and thereupon returns the writ *nulla bona*, an action for a false return cannot be maintained against him, although it should turn out that the goods belonged to the defendant in the writ.

SHERIFF, CALLED UPON TO SERVE WRIT BY ATTACHING PROPERTY OR ARRESTING PERSON, HAS RIGHT TO DEMAND INDEMNITY of the plaintiff in the writ, it seems, before executing the writ, if there is reasonable doubt as to the ownership of the property, or the identity of the person.

SHERIFF IS NOT JUSTIFIED IN ALL CASES IN TURNING OUT, UNDER WRIT OF POSSESSION, PERSONS IN POSSESSION, who are not parties to the action, or named in the writ, even though they may have entered after action brought.

SHERIFF, CALLED UPON TO ISSUE WRIT OF POSSESSION, HAS RIGHT TO DEMAND INDEMNITY of the plaintiff, before executing the writ, if he finds persons in possession who are not parties to the action or named in the writ, and who claim to be rightfully in possession, and there is reasonable doubt whether he has a right to turn them out; and this, although the premises are specifically described in the writ.

ACTION against a sheriff and his bondsmen for a false return, and neglect and refusal to execute a writ of possession. The facts are stated in the opinion.

William S. Wells, for the appellants.

M. A. Wheaton, for the respondents.

By Court, SAWYER, C. J. Martin A. and J. T. Hull being in possession of the premises in question, one R. B. Ellis commenced a suit against them in the county court of Solano County to recover the possession, alleging in his complaint that the said Hulls entered under a lease from said Ellis, dated November 2, 1860, for a term ending November 1, 1861, that the term had expired, that possession had been demanded in writing and refused, and that said defendants wrongfully withheld possession. After a trial by jury and verdict for plaintiff, judgment was rendered for restitution of the premises, damages, and costs, on the 24th of December, 1861. Subsequent to the entry of said judgment, to wit, on the 31st of December, 1861, W. and W. B. Long, the plaintiffs in this action, also commenced a suit against said Hulls to recover the same premises, and on the 29th of May, 1862, recovered a judgment by default for the possession of the premises, as against defendants, J. T. Hull and M. A. Hull, and all persons holding by, through, or under them. Before the recovery of the last-named judgment,—on the 5th of May, 1862,—a writ of restitution was issued upon the judgment in the said cause of *Ellis v. Hull and Hull*, under which the Hulls were turned out and Ellis placed in possession, which writ was returned with the acts of the sheriff indorsed thereon on the 17th of May, 1862. One William Brown then went into possession as the tenant of said Ellis. Afterwards, on the 2d of June, 1862, a writ of possession was issued upon the said judgment of May 29, 1862, in the case of *Long v. Hull*, and placed in the hands of Neville, defendant in this suit, who was sheriff of the county at that time, for execution. This writ was returned on the 19th of August, 1862, with the following return indorsed thereon: "I return the within writ not executed, neither of defendants named therein being in possession of the premises, and having been warned by other parties in possession of the same claiming title thereto, to execute the same at my peril, and having demanded from the plaintiffs a bond of indemnification, the same having been refused, I have refrained from further action in the premises."

In the mean time the plaintiffs in that suit without success applied to the county court, and afterwards to our predecessors, for a mandate to compel the sheriff to execute the writ. This action is brought by the Longs against the sheriff, Neville, and his bondsmen, alleging a false return and neglect and refusal to execute said writ, and seeking to recover damages. Plain-

tiffs had judgment, and a motion for a new trial having been made and denied, defendants appeal.

The principal ground of defense is, that when the sheriff went to execute the writ, he found other parties in possession than those named in the complaint and judgment, who claimed to be rightfully in possession, and not in privity with the defendants, and not subject to be dispossessed under the writ, who informed the sheriff that if he turned them out it would be at his peril; that thereupon he notified the plaintiffs in the action of said claim and threat, and demanded an indemnity before proceeding to execute the writ, which they refused to give, and upon that ground he declined to assume the responsibility of executing the writ, and returned it with his doings, and reasons for not executing it. If this is a good defense, that is, if defendant was entitled to demand indemnity under the circumstances, then the judgment is erroneous, and must be reversed, for this state of facts appeared at the time when the plaintiff rested, and the motion for a nonsuit on this ground was made and denied, and no evidence tending to show the return to be false in fact had been introduced. Besides, subsequently, there was an instruction to the jury, not very well drawn, perhaps, but substantially presenting the question asked by the defendant and refused, to which refusal an exception was duly taken. This question was not presented when the case was here before.

There can be no doubt that when an attachment or execution is placed in the hands of an officer to be executed, he may demand indemnity of the plaintiff in the execution before he can be required to seize property in the possession of third parties claiming to be the owners, and that if the plaintiff upon demand fails to indemnify the officer, and he thereupon returns the writ *nulla bona*, an action for false returns cannot be maintained, even if it should turn out that the goods so found in the hands of strangers claiming to own them were the goods of the defendant in the writ: *Marshall v. Hosmer*, 4 Mass. 63; *Bond v. Ward*, 7 Id. 125 [5 Am. Dec. 28]; *Marsh v. Gold*, 2 Pick. 290; *Chamberlain v. Beller*, 18 N. Y. 117.

Where statutes exist providing for calling a sheriff's jury preliminary to demanding indemnity, it may be necessary to call a jury before demanding the indemnity, unless the calling of a jury be waived: *Curtis v. Patterson*, 8 Cow. 67. In *Marsh v. Gold*, 2 Pick. 289, Mr. Chief Justice Parker says: "An officer called upon to serve a precept, either by attaching property or

arresting the person, if there be any reasonable grounds to doubt his authority to act in the particular case, has a right to ask for an indemnity. He is not obliged to serve process in civil actions at his own peril, when the plaintiff in the suit is present, and may take the responsibility upon himself. And it has been decided that the sheriff has a right to require indemnity of the creditor, when he shall be directed to attach chattels, the property in which may be questionable: *Marshall v Hosmer*, 4 Mass. 63. The same right exists when the sheriff shall be directed to arrest the body of any man, and he has reasonable doubts of the identity of the person. There can be no reason why the same principle should not apply where there may be doubts of the lawfulness of arrest on other grounds." And in *Chamberlain v. Beller*, *supra*, Mr. Justice Roosevelt says: "The officer, in demanding the bond, sought no advantage to himself, but simply desired; as it was natural he should, to protect himself against loss. The risk he was required to run was not for his benefit, but for the benefit of the attaching creditor. If the goods, moreover, as the creditor alleged, were the property of his debtor beyond dispute, he, the creditor, could not be injured by giving the indemnity, and if they were not, it was right that he who, for his own supposed advantage, insisted on the seizure, should take the consequences of the act. Such would seem clearly to be the dictate of common sense and common justice; in other words, in the absence of contrary authority, of common law." In *Tevis v. Ellis*, 25 Cal. 516, judgment had been recovered against Calderwood on an adverse title, and Tevis put in possession on a writ of restitution on the 16th of April, 1863. A second judgment had been recovered by other parties against Calderwood by default, and, as alleged, by collusion, for the same premises, on the 5th of June, 1863, upon a complaint filed on the 10th of March, 1863, before Tevis was put in possession. We held that, under the circumstances, the sheriff would be a trespasser in turning out Tevis under a writ issued under the second judgment. So in *Watson v. Dowling*, 26 Id. 127, we held that a party rightfully in possession under his own title could not properly be dispossessed under a writ issued in a suit to which he was in no way a party, or in privity with a party, even though he entered after suit brought. And in the present case, when here before, we cited the case of *Jones v. Chiles*, 2 Dana, 25, as indicating an instance in which a sheriff would not be justified in turning out a party who has

come into possession pending the suit, under a writ of possession issued under a judgment recovered in another suit against the same defendants upon an adverse title: *Long v. Neville*, 29 Cal. 136. There are cases, then, in which the sheriff would not be justified in turning out parties in possession who are not parties to the suit or named in the writ, even though they may have entered after suit brought; and the question whether a party found in possession when the writ issues, but not a party to the suit, must go out or not, is often one of great nicety. To determine the question, it is necessary that the officer should both accurately ascertain the facts, and then determine the law correctly. In both particulars there is great liability to error. This very case affords an excellent illustration of the embarrassment under which an officer would labor, if he was, in such cases, compelled to decide these questions at his peril. After a full litigation of the question, the right of the sheriff to turn out Brown under the writ, on appeal, and after careful consideration, this court once held that Brown could not be dispossessed, but on rehearing granted, and after a further and more mature consideration, it was finally determined by a bare majority of the court that Brown must go out, and on the facts as there presented, that the sheriff was liable for not executing the writ. If the courts, after due investigation, with all the means at their command necessary for the purpose, find great difficulty in determining the question, how is a mere ministerial officer, possessing none of their facilities, to ascertain the facts and apply the law correctly? The officer has no personal interest in the matter, and in a case of doubt like the one in question, when the parties in interest are unwilling to take the responsibility and hold him harmless, why should he be compelled to act at his peril?

We see no reason why the remarks of Mr. Justice Roosevelt in *Chamberlain v. Beller*, 18 N. Y. 117, do not apply with equal force to the case in hand. We do not perceive that the fact that the premises are specifically described makes any difference; for we have seen that even in such cases there may be parties in possession who cannot be turned out without committing a trespass. Suppose Jones is clearly the owner, and in undisputed possession of a lot, and a suit is brought against Smith, who is out of possession, to recover it, and judgment taken by default or collusion, there can be no doubt that the ejection of Jones, against his protest, under a

writ giving a specific description of the premises, would be a trespass. If not, there would be a very easy way of recovering the possession of lands, — much easier and less expensive than serving the owner in possession. A warrant of arrest describes the party to be arrested. Yet Mr. Chief Justice Parker says, in language already cited: "The same right exists when the sheriff shall be directed to arrest the body of any one, and he has reasonable doubts of the identity of the person. There can be no reason why the same principle should not apply when there may be doubts of the lawfulness of arrest on other grounds": *Marsh v. Gold*, 2 Pick. 290. So here there is no reason why the same principle should not apply where doubts exist as to whether strangers to the suit, in possession when the writ issues, may be lawfully turned out. The judgment, in terms, only authorized "said defendants, J. T. Hull and M. A. Hull, and all persons holding by, through, or under them," to be turned out of possession; and it is left to the officer to determine, at his peril, whether Brown did hold "by, through, or under them." And so, generally, when a stranger to the suit, in possession, claimed to be rightfully there, and not liable to be turned out, although the premises are correctly described, it is still necessary to ascertain the facts, and determine under the law whether he is liable to go out.

We think it clear that the case afforded reasonable grounds for the sheriff to entertain doubts as to his authority to turn Brown out; and that upon such doubts arising, he was justified in demanding indemnity from the plaintiffs before executing the writ. He was not bound to determine at his own peril the delicate and important questions of law and fact involved in the claim of parties, apparently strangers to the suit, in actual possession. If the parties interested were not willing to take the responsibility, there certainly is no reasonable ground for requiring the sheriff to proceed at his peril for their benefit.

Judgment and order denying a new trial reversed, and new trial granted.

THE PRINCIPAL CASE as it first came before the court is reported in *Long v. Neville*, 29 Cal. 131.

SHERIFF'S RIGHT TO INDEMNITY: See this subject discussed in *Spangler v. Commonwealth*, 16 Am. Dec. 548, and note. If a sheriff, called upon to execute a writ of possession, finds other persons in possession than those named in the writ, who claim to be rightfully in possession, not in privity with the

defendant, and there is a reasonable doubt whether he has a right to turn them out, he may refuse to execute the writ unless he is indemnified: *Grass v. Mitchell*, 31 Wis. 543; S. C., 11 Am. Rep. 620, quoting the principal case; *Muerstal v. Muir*, 64 Cal. 452, citing the principal case.

CANNON v. STOCKMON.

[36 CALIFORNIA, 535.]

PURCHASE OF OUTSTANDING ADVERSE CLAIM TO LAND BY ONE IN POSSESSION, CLAIMING ADVERSELY TO ALL OTHERS, for the purpose of quieting his title, does not estop him from setting up the statute of limitations against a third party also claiming under an adverse title.

ONE WHO IS IN POSSESSION OF LAND, CLAIMING IT AS HIS OWN, DOES NOT ADMIT TITLE IN ANOTHER by purchasing the other's claim of title to quiet his own title and avoid litigation. Such purchaser is not estopped by the purchase from denying the validity of the claim thus purchased.

ONE WHO HAS BEEN IN CONTINUED, EXCLUSIVE, ADVERSE POSSESSION OF LAND FOR FIVE YEARS IS ENTITLED TO BENEFIT OF STATUTE OF LIMITATIONS, although the five years are not "next preceding" the commencement of the action.

ONE WHO HAS BEEN IN ADVERSE POSSESSION OF LAND FOR FIVE YEARS THEREBY ACQUIRES FREE-SIMPLE TITLE; and it seems, if he is then ousted, even by the party holding the paper title, he can recover possession at any time before his right of action is barred by a five years' adverse possession.

FREE ONCE ACQUIRED BY FIVE YEARS' ADVERSE POSSESSION CONTINUES until conveyed by the possessor, or until lost by another adverse possession of five years.

PARTY CLAIMING TITLE BY FIVE YEARS' ADVERSE POSSESSION MAY GIVE IN EVIDENCE HIS ACTS AND DECLARATIONS, made or done at any time while in possession, for the purpose of showing the character in which he claimed.

ACTION to recover land. The facts are sufficiently stated in the opinion.

M. A. Wheaton and T. M. Swan, for the appellant.

William S. Wells, for the respondent.

By Court, SAWYER, C. J. This is an action to recover land. The answer sets up the statute of limitations as one defense. It appeared that after defendant and his grantors had been in possession for several years, a conveyance was taken from parties claiming title. The court gave several instructions at the request of plaintiff, and among them, instructions to the effect that, to maintain the defense, it was necessary for the defendant to show that he had been in the continued, exclu-

sive possession for five years next preceding the commencement of the suit under a claim of title; that such claim must be absolute, and exclusive of any other right; and that if during that time the defendant, or those under whom he claims, either by declaration or conduct, asserted their title to be in another person or persons, the statute cannot run in his favor. The defendant thereupon asked the court to give, among other instructions, the following: "A party in possession of premises, claiming to own the same, may buy his peace by purchasing any outstanding title, or claim of title, without admitting such title or claim of title to be valid"; which the court refused to give. In this we think the court clearly erred. We have no doubt that the instruction refused correctly states the law on the point. A party may very well deny the validity of an adverse claim or title, and yet choose to buy his peace at a small price, rather than be at great expense and annoyance in litigating it. And such is, doubtless, often the wiser course. It is notorious that, in the confusion of titles to land in this state, it is a matter of every-day experience to buy up, not one only but many adverse claims, even where the party buying believes he has, and actually has, the better title. To adopt any other principle than that embraced in the instruction refused, would, in this state, be to deprive a very large portion of the holders of real estate, if not nearly all of them, who stand in need of it, of all benefit of the statute of limitations. A party is not bound to admit, and does not necessarily admit, title in another because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. To hold otherwise would compel him to litigate adverse claims, or, by buying one, forego any right to claim the benefit of the statute of limitations as to all others. The principle of the case of *Schuhman v. Garratt*, 16 Cal. 100, covers this point. The acts and declarations of the possessor may, doubtless, be given in evidence with a view of showing the character of his claim, but whether the possession is adverse or not is a question for the jury to determine upon all the evidence. If a party is in possession continuously for five years, all the time claiming title exclusive of any other right, he is entitled to the benefit of the statute of limitations, no matter how many outstanding adverse claims he may purchase; and the question for the jury to determine on such

claim is, whether, upon all the evidence, he appears to have been continuously in possession during the time prescribed, claiming title exclusive of any other right.

Since the instruction asked states the law correctly, it should have been given in this case, for it was peculiarly applicable in view of the evidence and the instructions already given at the request of the plaintiff. If the plaintiff's instructions are conceded to be correct, so far as they go, this instruction was proper in order to present the whole law and guard the jury against any misapprehension of those instructions referring to the assertion of title in another by the acts and deeds of the defendant.

The first instruction given at the request of the plaintiff is erroneous in saying that defendant must have been in the "continued and exclusive possession for five years next preceding the commencement of this action." The statute says nothing of the kind. A party, to entitle him to maintain an action for the possession of land, must have been "seised or possessed of the premises in question within five years before the commencement of the action": Sec. 6. But a party who has been in the continued, exclusive, adverse possession for five years is entitled to the benefit of the statute of limitations, although the five years are not "next preceding" the commencement of the action. The language of sections 9 and 10, applicable to the party in adverse possession, is different from that of section 6, applicable to the party seeking to recover on his title against the adverse possessor. When a party has been in the adverse possession for five years, he thereby acquires a title, and if, after he has thus become vested with a right, he is ousted, even by the party holding the paper title, he can recover on his title acquired by his adverse possession at any time within five years after such ouster. *Arrington v. Liscom*, 34 Cal. 381 [94 Am. Dec. 722], and the numerous authorities therein cited, are conclusive on this point. As an example of the doctrine of the cases in that case cited, we quoted on page 383 from *School District No. 4 in Winthrop v. Benson*, 31 Me. 384 [52 Am. Dec. 618], where the court say: "A legal title is equally valid when once acquired, whether it be by disseisin or by deed; it vests the fee-simple, although the modes of proof, when adduced to establish it, may differ. . . . When the title is in controversy, it is to be shown by legal proof, and a continuous disseisin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of

the facts, and not by the exhibition of them in evidence. An open, notorious, exclusive, adverse possession for twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such a title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed." And in *Leffingwell v. Warren*, 2 Blackf. 605, the supreme court of the United States say: "The lapse of time limited by such statute not only bars the remedy, but it extinguishes the right and vests a perfect title in the adverse holder": See also, to same effect, *Taylor v. Horde*, 1 Burr. 119; *Stokes v. Berry*, 2 Salk. 421; *Drayton v. Marshall*, Rice's Eq. 385 [33 Am. Dec. 84]; *Jackson v. Oltz*, 8 Wend. 440; *Jackson v. Dieffendorf*, 3 Johns. 269; *Jackson v. Rightmyre*, 16 Id. 327; *Bradstreet v. Huntington*, 5 Pet. 438; *Thompson v. Green*, 4 Ohio St. 223; *Newcombe v. Leavitt*, 22 Ala. 631; *Chiles v. Jones*, 4 Dana, 483; *Alexander v. Pendleton*, 8 Cranch, 462. If the doctrine of these decisions is correct, it certainly is not necessary that the five years' adverse possession should be "next preceding" the commencement of the action. For when fee is once acquired by a five years' adverse possession, it continues in the possessor till conveyed in the manner prescribed for the conveyance of titles acquired in other modes, or till lost by another adverse possession of five years. So, upon the same principle, if a fee has once vested by a five years' adverse possession, the mere fact that the party, who has thus acquired a title already perfect, afterward asserts title also under some other title subsequently acquired, would not defeat the good title already vested under the statute of limitations. Acts and declarations of the party respecting his claim, at any time while in possession before commencement of the action, whether within or after five years after the commencement of his possession, would be admissible, as tending to show the character in which he claimed during the whole time; but the question as to whether there had been, at any time, a continuous, adverse possession of five years, must be determined by the jury from all the evidence bearing upon the question.

We are not only satisfied that the views here expressed state the doctrine established by the great mass of adjudications upon statutes of limitations affecting actions for the recovery of land, but that the construction adopted is the one best calculated to give full effect to the wise policy of such statutes

by putting an end to vexatious litigation, and affording repose to those who have been suffered by the laches of adverse claimants to remain for a long time in the possession of the soil under a claim of right. The instructions given, so far as they are inconsistent with the principles announced in this opinion, are erroneous. Judgment and order denying new trial reversed, and new trial granted, and *remittitur* directed to issue forthwith.

SANDERSON, J., dissented.

PURCHASE OF OUTSTANDING CLAIM BY ONE IN POSSESSION CLAIMING ADVERSELY does not render his adverse possession less hostile to the true title, nor divest his title already complete under the statute of limitations: *Owens v. Myers*, 57 Am. Dec. 693, and note; *Bannon v. Brandon*, 75 Id. 655; but it is otherwise if he offers to purchase the property: *Central Pacific R. R. v. Mead*, 63 Cal. 113; *Lovell v. Frost*, 44 Id. 474, both distinguishing the principal case.

PERIOD OF FIVE YEARS NEED NOT BE "NEXT PRECEDING" COMMENCEMENT OF ACTION, in order to make out an adverse possession sufficient to constitute a defense in ejectment under the statute of limitations: *Unger v. Mooney*, 63 Cal. 595, citing the principal case.

ADVERSE POSSESSION FOR PERIOD PRESCRIBED BY STATUTE OF LIMITATIONS NOT ONLY BARS REMEDY, but vests a perfect title in the adverse holder: *Stump v. Henry*, 61 Am. Dec. 300, and note; *Robertson v. Wood*, 65 Id. 140; *Smith's Adm'r's v. De la Garza*, 65 Id. 147; *Ford v. Wilson*, 72 Id. 137; *Williams v. Ballance*, 74 Id. 187; *Clemens v. Runckel*, 84 Id. 69; *Hicks v. Coleman*, 85 Id. 103; *Austin v. Bailey*, 86 Id. 703. The principal case is cited to this effect in *City and County of San Francisco v. Fulde*, 37 Cal. 352; *Langford v. Poppe*, 56 Id. 75; *Pacific M. L. Ins. Co. v. Stroup*, 63 Id. 153; *Johnson v. Brown*, 63 Id. 393; *Garabaldi v. Shattuck*, 70 Id. 513; *Lamb v. Davenport*, 1 Saw. 621; *Palmer v. Lou*, 2 Id. 249; *Meeks v. Vassault*, 3 Id. 217; *420 Mining Co. v. Bullion Mining Co.*, 3 Id. 658. And if the person who thus acquires title be ousted by the former owner, he may recover possession: *Langford v. Poppe*, 56 Cal. 75, quoting the principal case; and the legislature cannot take away his title: *Sharp v. Blankenship*, 59 Id. 289.

VAN DUSEN v. STAR QUARTZ MINING COMPANY.

[36 CALIFORNIA, 571.]

VERDICT WILL NOT BE DISTURBED BY SUPREME COURT BECAUSE AGAINST WEIGHT OF EVIDENCE, if the evidence is conflicting.

NOTICE BY PRINCIPAL TO THIRD PERSONS OF CONTENTS OF WRITTEN AGREEMENT WITH AGENT TERMINATING AGENCY is sufficient notice of the termination of the agency.

DECLARATIONS OF AGENT TO THIRD PERSONS THAT AGENCY HAD BEEN RENEWED ARE NOT ADMISSIBLE AGAINST PRINCIPAL to establish a new agency, after such third persons have been notified by the principal that the agency had terminated.

THIRD PERSONS HAVE NO JUST RIGHT TO CONCLUDE THAT NEW AGENCY HAD BEEN ESTABLISHED, after they have been notified by the principal that the former agency had ceased, from the fact that the agent was conducting business as formerly.

PRINCIPAL IS LIABLE TO THIRD PERSONS DEALING WITH AGENT AFTER AGENCY HAS CEASED, until they are notified of the termination of the agency.

ACTION for goods sold and delivered. The facts are sufficiently stated in the opinion.

T. B. Reardon, for the appellant.

A. A. Sargent, for the respondents.

By Court, CROCKETT, J. The plaintiffs sue for several amounts alleged to be due to them for goods sold and delivered. The first count in the complaint is on a special contract to the effect that the defendant promised the plaintiffs if they would furnish certain provisions to Withington & Co., who were running a tunnel for the defendants, and in the event that Withington & Co. failed to reach the ledge, the defendant would pay for the provisions. The averment is that the provisions were furnished on this agreement; that the rock turned out to be so hard as to be impervious, and Withington & Co. were unable to reach the ledge, and by reason thereof the defendant became liable under its contract to pay for the provisions.

The second is the ordinary count for the price of goods sold and delivered by the plaintiffs to the defendant; and the third count is for a butcher's bill alleged to have been due from the defendant to one Hershey, and which was assigned to the plaintiffs.

The plaintiffs had a verdict and judgment, and the defendant, having made a motion for a new trial, which was denied, has appealed.

The proof under the first count was, in some degree, conflicting; but in our opinion, the weight of the evidence was in favor of the plaintiffs. At all events, we cannot disturb the verdict on this branch of the case, on the ground that the plaintiffs failed to prove their cause of action as alleged.

The proof under the second count is, that one Withington had been for several years the foreman of the defendant's quartz-mill and mine, during which period he had been in the habit of ordering from the plaintiffs provisions for the use of the hands at the mine and mill, and the bills therefor had

always been paid by the defendant, without objection; that in December, 1866, a written contract was entered into between the defendant on the one part, and Withington and two other persons of the other part, whereby the latter agreed to run a tunnel for the defendant, and on the terms therein stated; and it was a condition of the contract that if Withington & Co. should not succeed in reaching the ledge, the defendant was to defray the expense of the provisions used during the prosecution of the work; that the plaintiffs had notice of this contract, and that work was being done on the tunnel under it. There was evidence tending to show that work on the tunnel had to be abandoned before the ledge was reached, because the rock became too hard to be worked. The tunnel was therefore abandoned, and work at the mine and mill was resumed as formerly, Withington apparently acting as foreman, in the same manner as he had done before the tunnel was commenced. Under these circumstances he purchased from the plaintiffs the goods mentioned in the second count of the complaint, saying he was purchasing them for the defendant, who would pay for them.

The defendant objected to the proof of his declarations, as incompetent evidence; and it appears that Withington was in fact working the mine on his own account, under a written contract with the defendant, of which the plaintiffs had no notice. The proposition of the defendant is, that the plaintiffs had notice of the contract for running the tunnel; that this was sufficient notice that the agency of Withington as foreman for the defendant had ceased; that when the tunnel was abandoned and work was resumed on the mine and mill, the plaintiffs were not authorized to infer that the former relations between Withington and the defendant had been re-established; and that the defendant did nothing to warrant or encourage that belief.

We think the contract for the tunnel was sufficient notice to the plaintiffs that the agency of Withington as foreman was at that time terminated. It contains a provision that Withington and his associates were to have the use of the defendant's tools, and were to keep them in repair at their own expense, and were to purchase all the provisions of the defendant then on hand; "and further, to make the said Star Company at no expense whatever, except as above stated." It further appears from the contract that the compensation for running the tunnel was to be fifteen hundred dollars,

whenever that amount shall have been realized from the rock to be taken from the ledge after it shall have been reached; the defendant "to take charge of the mill and mine when the ledge as aforesaid is reached or the mill commences crushing."

These provisions make it plain that during the progress of the work Withington was not acting as foreman for the defendant in any matter pertaining to the mine and mill. The plaintiffs admit that they had full notice of this contract, and they must be held to have known that the agency had ceased. But after the tunnel was abandoned, operations at the mine and mill were resumed and carried on apparently as they had been before, and no notice was given to the plaintiffs that Withington was conducting the work on his own account, and not for the defendant. Under these circumstances, were the plaintiffs authorized to deal with him as the agent of the defendant? We think not. When the agency had once ceased, and the plaintiffs knew it, the declarations of Withington were not competent evidence to establish a new agency; and there is no proof that the defendant performed any act tending to delude the plaintiffs into the belief that Withington had again become its agent. It permitted him, it is true, to work the mine and mill at his own expense and for his own benefit; but as the plaintiffs were aware that the former agency had ceased, they had no just right to conclude that a new agency had been established from the mere fact that Withington was again conducting operations at the mine. The court, therefore, erred in admitting in evidence the declarations of Withington as to his agency; and so much of the verdict as relates to the cause of action set up in the second count of the complaint is unsupported by the evidence.

We cannot disturb the verdict so far as it is founded on the cause of action alleged in the third count. The course of dealing between Hershey and the defendant was sufficient proof of the original agency; and the testimony is conflicting in respect to the knowledge of Hershey that the agency had terminated. We cannot say that the verdict on this branch of the case is unsupported by the evidence.

There is nothing in the record to enable us to ascertain the precise amount of the erroneous recovery on the second count of the complaint, otherwise we would modify the judgment, and affirm it as to the remainder of the recovery.

The judgment is therefore reversed, and the cause re-

manded for a new trial, and *remittitur* directed to issue forthwith.

AGENT MAY BIND PRINCIPAL WITHIN SCOPE OF AUTHORITY FORMERLY POSSESSED BY HIM until the third persons with whom he deals have been notified of the termination of the agency: *Tier v. Lampson*, 82 Am. Dec. 634, and note considering the question; *Capen v. Pacific Mutual Ins. Co.*, 64 Id. 412; *Dacey v. Kellogg*, 92 Id. 154.

GRIGSBY v. NAPA COUNTY.

[36 CALIFORNIA, 553.]

ORDER OF COURT BELOW DISMISSING ACTION FOR WANT OF PROSECUTION WILL NOT BE REVERSED by the supreme court unless there has been an abuse of discretion; and it is incumbent on the appellant to establish affirmatively that there has been such abuse of discretion.

COURT IS JUSTIFIED IN DISMISSING ACTION BECAUSE OF PLAINTIFF'S WANT OF DILIGENCE in allowing an action to rest, without service of summons, for two years and eight months after the summons is issued.

ACTION MAY BE DISMISSED BY COURT FOR WANT OF PROSECUTION, NOTWITHSTANDING ENTRY OF DEFAULT, where the notice to dismiss is given before summons is served, and the plaintiff then serves the summons, and at the end of ten days takes a default, but judgment is not entered up. The dismissal takes effect by relation back to the time of service of the motion.

APPEAL for an order dismissing an action for want of prosecution.

T. J. Tucker, for the appellant.

R. N. Steere, for the respondent.

By Court, CROCKETT, J. This appeal is from an order of the district court dismissing the action for want of prosecution, and awarding costs to the defendant. In such cases, it has not been the practice of this court to interfere, except where the district court has abused the discretion which it necessarily exercises in this class of cases; and in invoking the aid of this court, it is incumbent on the appellant to establish affirmatively that there has been such abuse of discretion. Until the contrary appears, the presumption is, the discretion of the district court was rightfully exercised. The appellant has failed, we think, to show such abuse of discretion in this case. The action was commenced August 26, 1865, and on the same day a summons was issued, and placed in the hands of the sheriff for service; but before served, he was instructed by the plaintiff's attorney not to serve it until he received further orders.

The summons was not, in fact, served until May 14, 1868; and the excuse for this long delay is, that the plaintiff and his attorney were lulled into this long repose by the conduct of the board of supervisors in vacating and rescinding the order approving the report of the viewers of the road, and thereby inducing the plaintiff to believe that the project of opening the road was abandoned, and that it would therefore be unnecessary to prosecute his action for damages. It appears, however, that the rescinding order was itself rescinded, and the original order was thereby left in full force; but at what particular time this occurred does not appear. It is quite apparent, however, that during the long interval which elapsed between August 26, 1865, and May 14, 1868, the plaintiff was not resting quietly under the belief that the proceedings for establishing the road had been abandoned. On the contrary, he commenced an action in equity to prevent the supervisors from opening the road until the question of damages was disposed of in this action. The suit in equity came to this court on appeal, and was decided at the October term, 1866 (*Grigsby v. Burtnett*, 31 Cal. 406), and we held that the plaintiff was entitled to have the question of damages decided before the road was opened. Instead of prosecuting his action, already pending for that purpose, the plaintiff allowed it to slumber until May 13, 1868, when he was served with notice of a motion to dismiss it for want of prosecution. On the following day he caused the summons, issued more than two years before, to be served; and the defendant, having failed to answer within ten days, its default was noted, but no assessment had been made or judgment entered by the court; and on the day specified in the notice, the defendant moved, notwithstanding the default, to dismiss the action for want of prosecution, and the plaintiff at the same time offered to prove the damages, and moved for final judgment. The court sustained the defendant's motion, and the plaintiff insists, — 1. That no lack of diligence was shown; and 2. That the defendant is concluded by the default.

On the question of diligence, we see no reason to believe that the district court abused its discretion, nor is the defendant concluded by the default. Notice of the motion to dismiss was served before service of the summons, and though it would doubtless have been the better practice to have obtained from the court an extension of the time to answer until after the motion to dismiss was disposed of, nevertheless the order dis-

missing the cause took effect by relation from the time when the notice of the motion was served, which was prior to the service of summons. When the cause was dismissed there had been no final judgment, and the mere noting of the default did not in law preclude the court from entertaining the motion to dismiss with like effect as if there had been no service of the summons after notice of the motion to dismiss.

We find no error in the record, and the judgment is therefore affirmed, and *remittitur* directed to issue forthwith.

DISMISSAL OF ACTIONS BY COURT FOR WANT OF PROSECUTION.—The dismissal of actions by courts for want of prosecution is a practice which does not seem to generally prevail. Still it is settled in California that a court may, in the exercise of its discretion, dismiss an action for this cause; and unless an abuse of discretion be shown, the supreme court will not interfere. Thus if there has been unreasonable and inexcusable delay in serving the summons, the action may be dismissed: *Dupuy v. Shear*, 29 Cal. 238; *Carpentier v. Minturn*, 39 Id. 450; *Eldridge v. Kay*, 45 Id. 49; *Lander v. Flemming*, 47 Id. 614; or a failure to have the summons issued within one year from the filing of the complaint: *Reynolds v. Page*, 35 Id. 296; *Linden Gravel Min. Co. v. Sheplar*, 53 Id. 245; but not where such delay in issuing the summons is at the request of the defendant: *Cowell v. Stuart*, 69 Id. 525. So the court may dismiss because of the plaintiff's neglect for more than two years to bring the case to trial, or to take steps looking to a trial: *Simmons v. Keller*, 50 Id. 38; or for unreasonable delay in the prosecution of proceedings in insolvency: *Kornahrens v. His Creditors*, 64 Id. 492; or for a neglect for fourteen years to file a *remittitur* in the court below after the plaintiff has obtained a reversal of a judgment on appeal: *Chipman v. Hibberd*, 47 Id. 638. The question of diligence in prosecuting the action must have been first presented to the court below, or it will not be considered by the supreme court: *Poole v. Caulfield*, 45 Id. 107. As the court may dismiss an action for want of prosecution, so it may vacate the order of dismissal, and such order will not be reversed by the supreme court, unless there has been a clear and manifest abuse of discretion: *Seymour v. Wood*, 63 Id. 81. After a dismissal, the action may be commenced anew: *Kornahrens v. His Creditors*, 64 Id. 492. But of course this would not be possible if the statute of limitations had barred the cause of action.

CASES
IN THE
SUPREME COURT
OF
CONNECTICUT.

READ v. TUTTLE.

[25 CONNECTICUT, 25.]

LEASE, WHEN VOIDABLE, AND HOW AVOIDED—LIMITATION AS TO WAIVER OF DEMAND AND RE-ENTRY.—Where a lease contains the following clauses: "If said rent shall remain unpaid after the same shall become payable, the lease shall thereupon expire and terminate, and the lessor may, at any time thereafter, re-enter the premises and the same possess as of his former estate; and without such re-entry may recover possession in the manner provided by the statute relating to summary process; it being understood that no demand for the rent and re-entry for condition broken as at common law shall be necessary to enable the lessor to recover possession under said statute, but that all right to any such demand or re-entry is expressly waived by the lessee,"—it is voidable at the election of the lessor upon the non-payment of rent when due and properly demanded; but though the lessor need not make a formal re-entry to avoid the lease, he must do some unequivocal act that will signify to the lessee his election to terminate the lease; and the waiver of a demand and re-entry is limited to such demand and re-entry as are necessary for a recovery of the premises under the statute relating to summary process, and has no application to an action of ejectment.

EJECTMENT. The facts were found and judgment rendered for the plaintiff. Defendant moved for a new trial. The facts are stated in the opinion.

Bronson, in support of the motion.

Wright, *contra*.

By Court, PARK, J. We do not decide whether there was a forfeiture of the lease in consequence of the non-payment of rent, for we think the case of *Bowman v. Foot*, 29 Conn. 331,

determines the case in favor of the defendant, even if there was a forfeiture. The lease in that case was in all essential particulars like the one in question. It provided that in case the lessee should neglect to pay the rent when due, the lease should thereupon expire and terminate, and the lessor should have the right at any time thereafter to re-enter the premises, and the same have and possess as of his former estate. The court held that on the non-payment of rent, when due and properly demanded, the lease was voidable at the election of the lessor, but that, in order to take advantage of the forfeiture, active measures were required of him; that while he need not make a formal re-entry upon the premises, he must do some unequivocal act that would signify to the lessee in a decisive manner his election to terminate the lease.

This was not done in the case under consideration. But it is said that the lease expressly waives all active duty on the part of the lessor in order to take advantage of the forfeiture, and we are referred to the last clause in the following paragraph of the lease in support of the claim: "The party of the first part may at any time thereafter re-enter said premises, and the same have and possess as of his former estate, and without such re-entry may recover possession thereof in manner prescribed by the statute relating to summary process; it being understood that no demand for the rent and no re-entry for condition broken, as at common law, shall be necessary to enable the lessor to recover such possession pursuant to said statute relating to summary process, but that all right to any such demand or any such re-entry is hereby expressly waived by the said party of the second part." The claim is, that the last clause constitutes an independent covenant, and is not qualified by what next precedes it. But it is clear that it has reference to the context, and was an effort on the part of the draughtsman to make what was there expressed more definite and certain. The waiver previously described is particularly limited to the action of summary process, and strange indeed would it be that, after thus making an intentional definite limitation, a general unlimited waiver should be inserted, applicable to all forms of action. The meaning of the clause can be clearly shown by transposing the parts of the sentence: "It being understood that no demand for the rent and no re-entry for condition broken, as at common law, shall be necessary; but that all right to any such demand, or any such re-entry, is hereby expressly waived by the said party of the

second part, to enable the lessor to recover such possession pursuant to said statute relating to summary process."

The waiver, then, is confined to the statutory mode of obtaining possession of the premises, and has no reference to the common-law action of ejectment.

There is manifest error in the judgment complained of, and a new trial is advised.

In this opinion the other judges concurred.

PATTERSON v. BLOOMER.

[35 CONNECTICUT, 57.]

APPLICATION TO COURT OF EQUITY TO DECREE SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY REAL ESTATE IS ADDRESSED TO DISCRETION OF COURT, AND WILL NOT BE GRANTED unless the contract is made according to the requirements of the law, and is equitable, reasonable, certain, mutual, on good consideration, consistent with policy, and free from fraud, surprise, or mistake.

MISTAKE OF LAW AS TO EFFECT OF CHATTEL MORTGAGE. — Where a vendor residing in the state of New York made a contract for the sale of a quarry in Connecticut, and of personal property valued at twenty-five thousand dollars connected with it, the whole for fifty-five thousand dollars, of which five thousand dollars was to be paid down, the balance to be secured by a mortgage back, but where he made the agreement under the mistaken belief that a chattel mortgage would be a valid security in Connecticut without a retention of possession by him, and where the purchaser was insolvent, it was held that he was justified in refusing to convey, and that he ought not to be compelled to convey, in the exercise of the discretion of a court of equity.

BILL in equity to compel the specific performance of a contract to convey a quarry and personal estate connected with it. The property was situated in Connecticut, but belonged to Bloomer, a resident of New York. Bloomer, in consideration of one dollar, agreed to sell and convey the property to Robertson, also a resident of New York, upon terms as follows: The property, consisting of the quarry and personal property worth about twenty-five thousand dollars connected with it, was to be sold for fifty-five thousand dollars, of which five thousand dollars was to be paid within ten days, and the balance to be secured by a mortgage back. Bloomer made the agreement under the mistaken belief that a chattel mortgage would be a valid security in Connecticut without a retention of possession by him. The purchaser was insolvent, and the court below admitted evidence that he was known not to have any legiti-

mate business, and had a bad business reputation, etc. Other facts are stated in the opinion. The court dismissed the bill. The petitioner moved for a new trial, on the ground of sundry rulings of the court, with regard to the admission of evidence as to the character, standing, and financial ability of the petitioner, and as to his fraudulent conduct.

C. R. Ingersoll and Culver, in support of the motion.

H. B. Harrison and Warner, contra.

By Court, BUTLER, J. Applications of this character are addressed to the discretion of the court, and will not be granted unless the contract is made according to the requirements of the law, and is fair, equitable, reasonable, certain, mutual, on good consideration, consistent with policy, and free from fraud, surprise, or mistake.

The agreement set forth by the petitioner is made according to the forms of law, and is apparently fair, equitable, certain, and mutual, consistent with policy, and made on good consideration, and if there were nothing more in the case the petitioner would be entitled to the relief sought.

But the respondent sets up in his answer fraud and mistake, and justifies his refusal to execute the contract on those grounds; and the parties were at issue upon the question whether there was either fraud or mistake to justify the refusal. The court found both and dismissed the bill.

The questions here are raised upon the motion for a new trial. That motion sets forth certain rulings of the court in relation to the admission of evidence offered to prove the allegation of fraud. In respect to the ground of mistake, although alleged in the answer and found by the court, the motion is silent. It is obvious that if the mistake set up and found was a material one, the respondent was justified in his refusal to execute the agreement, and that a new trial can be of no service to the petitioner; and a consideration of the alleged erroneous rulings of the court in the admission of evidence is unnecessary. We cannot doubt the materiality of that mistake.

The parties were both residents of the state of New York, and unacquainted with our laws. The respondent was selling a very large property, valued at more than fifty thousand dollars, on time. Twenty-five thousand dollars' worth of that property was personal. There were also engagements for the

fulfilling of contracts, upon which, if unfulfilled, the respondent would be liable for considerable damages. The cash-down payment was small, and for the performance of the contract by the petitioner he stipulated for no other security than a mortgage upon the property sold. The respondent was entitled by the agreement to no security for the safety of the large amount of personal property, or the performance of the contracts which he had made with others, except a chattel mortgage upon that personal property, and the agreement was made upon the supposition that such a mortgage would be valid. The parties were mistaken; such a mortgage would be worthless unless possession was retained by the vendor. It is too clear for doubt that the respondent never would have entered into that agreement but for the mistaken supposition that in the execution of it he was to have the protection of a valid mortgage on twenty-five thousand dollars' worth of personal property, and it is equally clear that such a mistake is a most material one, and that it was the right and the duty of the respondent to refuse to execute the agreement upon discovering the mistake. It would be grossly inequitable and unjust to compel him to perform it.

Certain circumstances are relied upon by the petitioner to relieve the case from the operation of this mistake. It is found by the court that "there was expectation that, if by the laws of Connecticut the chattel mortgage was not a good and valid security, while the mortgagor remained in possession of the chattels mortgaged, such other and further security should be given by the petitioner as should secure to the respondent the payment of the purchase-money; but there was no express agreement to that effect, and no understanding as to the nature of such further assurance."

But this cannot aid the petitioner. It was an expectation merely, not a part of the agreement relied upon, nor of any subsequent or further agreement, nor was there any offer of other and different security made or tendered at the time when the tender of the five thousand dollars was made, and a deed demanded, or at any other time. Offers of payment are found to have been subsequently made, but they were not tenders, and were subsequent and inadequate.

And in this connection we cannot avoid looking at the false representations made by the petitioner, and the facts found in relation to his character. Whether they do or do not show an attempted fraud, they most certainly do show that the re-

spondent as a prudent man ought not to have fulfilled this contract at the time when demand was made upon him without the most ample and undoubted security. Such security he could not have under the agreement, and equivalent and adequate security was never tendered him.

A consideration of the other questions in the case is unnecessary. A new trial must be denied.

In this opinion the other judges concurred, except PARK, J., who dissented.

BILL FOR SPECIFIC PERFORMANCE IS ADDRESSED TO SOUND LEGAL DISCRETION OF COURT: See *Frisby v. Ballance*, 39 Am. Dec. 409, note 413; *Trigg v. Read*, 42 Id. 447, note 468.

BILL FOR SPECIFIC PERFORMANCE, PRINCIPLES UPON WHICH IS DENIED OR DECREED: *Frisby v. Ballance*, 39 Am. Dec. 409; *Trigg v. Read*, 42 Id. 447.

MISTAKE OF LAW AS GROUND OF RELIEF IN EQUITY: See note to *McNaughten v. Partridge*, 38 Am. Dec. 735; *Ilaurally v. Warren*, 90 Id. 613; *Town of Rochester v. Alfred Bank*, 80 Id. 746, note 751; *Freeman v. Curtis*, 81 Id. 564; *McDaniels v. Bank of Rutland*, 70 Id. 406, note 413.

DISTINCTION BETWEEN "MISTAKE OF LAW" AND "IGNORANCE OF LAW": See note to *Champlin v. Laytin*, 31 Am. Dec. 396; note to *Trigg v. Read*, 42 Id. 467; note to *Town of Rochester v. Alfred Bank*, 80 Id. 751; *State v. Paup*, 56 Id. 303.

MISTAKE OF FOREIGN LAW IS MISTAKE OF FACT: See cases cited in note to *Miles v. Stevens*, 45 Am. Dec. 631; note to *Trigg v. Read*, 42 Id. 468.

WHILE SOME COURTS HOLD THAT IGNORANCE OF LAW IS NO GROUND FOR RELIEF IN EQUITY, *Pierson v. Armstrong*, 63 Am. Dec. 440, other courts have granted relief, in cases of peculiar hardship, from mistakes as to the legal effect of a law: *State v. Paup*, 56 Id. 303, a well-considered and valuable case. In *Tyson v. Passmore*, 44 Am. Dec. 181, it is held that ignorance of the law of the place of contract by a non-resident contracting party is no more a ground of relief than if he were a citizen of the state, for he is bound to know the laws of the country on the basis of which he deals.

IF TWO PARTIES ENTER INTO CONTRACT UNDER MISTAKE OF LAW, EQUITY WILL RELIEVE upon the ground of surprise; and if one party is mistaken as to the law, and the other with knowledge contracts with him, it will relieve upon the ground of fraud: *State v. Paup*, 56 Am. Dec. 303.

MIX'S APPEAL.

[35 CONNECTICUT, 121.]

DECREE OF PROBATE COURT, UNLESS APPEALED FROM, IS FINAL AND CONCLUSIVE upon the parties as to all matters within its jurisdiction which are necessarily involved in the issue; but this general rule applies only to final decrees.

DISTINCTION IS TO BE OBSERVED BETWEEN ORDERS AND DECREES MADE DURING SETTLEMENT OF ESTATE which are merely preparatory to a final settlement and distribution, and a final decree adjusting and closing an administration account. The latter only possesses the elements of a final judgment; the former are preliminary, and subject to change or modification, as the exigencies of the case and the demands of justice require.

COURT OF PROBATE, AS TO ALL MATTERS WITHIN ITS JURISDICTION, IS CLOTHED WITH CHANCERY POWERS to do full justice between the parties; and like a court of chancery, has power, in rendering a final decree, to correct mistakes in its prior proceedings.

COURT OF PROBATE HAS POWER, IN ITS FINAL DECREE SETTLING ADMINISTRATION ACCOUNT, TO CORRECT ANY ERRORS made in any former and partial settlement of the account; and evidence may be admitted to prove such mistakes.

ON APPEAL FROM DECREE OF PROBATE COURT SETTLING ADMINISTRATION ACCOUNT, BUT REFUSING TO ALLOW CORRECTION OF ERROR IN FORMER SETTLEMENT, APPELLEES OFFERED TO PROVE that the appellant had received certain personal property belonging to the estate, which was not inventoried, and not accounted for in the administration account, and with which the administrator ought, as they claimed, to be charged: *held*, to be inadmissible, as the pleadings contained no reference to this matter; that if they did, such evidence could not affect the error in the former settlement, and that the error should be corrected in the former settlement, and the appellees left to their appropriate remedy, — a suit on the bond.

APPEAL from a decree of a probate court settling the account of the appellant as administrator on the estate of J. E. Webster. The superior court reversed the decree appealed from, and the appellees brought the record before this court by a motion in error. The facts are stated in the opinion.

Goodman, for the plaintiffs in error.

Welch, for the defendant in error.

By Court, **CARPENTER, J.** On the twenty-eighth day of June, 1864, the appellant, as administrator on the estate of Joseph E. Webster, deceased, presented to the court of probate an administration account, which was intended as a preliminary, and not as the final, account, in which he erroneously, and through mistake and inadvertence, charged himself with the whole of the personal property embraced in the inventory,

only twenty-six eightieths of which belonged to the estate. In his final account he attempted to correct the mistake, by charging to the estate the sum of \$419.85, that being the amount erroneously charged to himself in the first account. The court of probate refused to allow this item, and he appealed to the superior court. The superior court reversed the judgment of the court of probate, and decreed that that amount should be allowed the appellant. On the trial in the superior court, the appellees objected to the evidence offered to prove the mistake, upon the ground that the decree of the court of probate allowing the first account was conclusive. We are not disposed to question the proposition that a decree of a court of probate, unless appealed from, is final and conclusive upon the parties, as to all matters within its jurisdiction which are necessarily involved in the issue. The question here is, whether this case falls within that principle. A distinction is to be observed between orders and decrees made during the settlement of an estate which are merely preparatory to a final settlement and distribution, and a final decree adjusting and closing an administration account. The latter only possesses the elements of a final judgment; the former are preliminary, and subject to change or modification, as the exigencies of the case and the demands of justice may require. We believe the practice has been, and now is, for the court of probate, in adjusting the final account, to rectify all mistakes in the prior proceedings. Thus property embraced in the inventory which belongs to other parties is charged to the estate in the administration account, and no probate judge hesitates to allow it. No one will seriously contend that the decree of the court accepting the inventory is conclusive upon the administrator as to the title of all the property therein named. If an administrator, in making a return of sale of real or personal property, makes a mistake in the amount realized, we know of no principle prohibiting the court of probate from rectifying the mistake in the settlement of the administration account. We cannot see why the court should not apply the same rule to a mistake in a mere preliminary statement of an account, especially if it is not intended by the administrator, nor regarded by the court, as a final account.

Courts of probate, as to all matters within their jurisdiction, are clothed with chancery powers, so far as may be necessary to enable them to do full justice between the parties. As a court

of chancery will, in passing a final decree, correct mistakes, if any, in the interlocutory orders and decrees, so will a court of probate, in furtherance of justice, correct mistakes in its prior proceedings. We ought not, therefore, to give the decree in question the force and effect of a final decree. For these reasons, we think the superior court did right in admitting evidence to prove the mistake.

Another question is made concerning the admission of evidence, offered by the appellees and rejected by the superior court, to prove that the appellant had received certain personal property belonging to the estate, which was not inventoried, and not accounted for in the administration account. The pleadings do not present a formal issue; but under our practice the case stands upon the general issue, or a simple denial by the appellees of the truth of the allegations contained in the reasons of appeal. If so, that, and that alone, so far as questions of fact were concerned, was the issue to be tried. As the pleadings contain no reference to this matter, we think the court did right in excluding the evidence. But suppose all that the appellees claim in this respect to be true, what then? We do not see how that can affect the propriety of the appellant's charge. The error of the probate court in rejecting that must still be corrected, and we know no better way than to allow that charge, and leave the appellees to their appropriate remedy,—a suit on the bond.

There is no error in the judgment of the superior court.

In this opinion the other judges concurred.

DECREES OF PROBATE COURT, CONCLUSIVENESS OF: See note to *Waters v. Stickney*, 90 Am. Dec. 136. As to how far conclusive is final settlement of administration account, see note to *Wiggin v. Swett*, 39 Id. 724; *Stubblefield v. McRaven*, 43 Id. 502; *App v. Dreisbach*, 21 Id. 447. A court of probate will, on final settlement, correct a mistake made in an administrator's account by omission: See note to *Wiggin v. Swett*, 39 Id. 724; and a court of equity will afford relief against a palpable mistake appearing upon the face of an executor's account after final settlement and allowance: *Black v. Whitall*, 59 Id. 423. As to when administration accounts once settled are not open to re-examination, see note to *Wiggin v. Swett*, 39 Id. 724.

CHANCERY POWERS OF PROBATE COURT: See note to *Waters v. Stickney*, 90 Am. Dec. 136; *People v. Wayne Circuit Court*, 83 Id. 754; extended note to *Deck v. Gerke*, 73 Id. 558-560; on jurisdiction of chancery, how far divested in general by probate system: *McPherson v. Cunliff*, 14 Id. 642; note to *App v. Dreisbach*, 21 Id. 454.

FINAL JUDGMENT OR DECREE, WHAT IS: See note to *Lewis v. Campan*, 90 Am. Dec. 248; *Teaff v. Hewitt*, 59 Id. 634, note 657; extended note to *Williams v. Field*, 60 Id. 427-439, discussing the subject.

FINAL JUDGMENT OR DECREE, WHAT IS NOT: See note to *Levie v. Campan*, 30 Am. Dec. 248; *Teaff v. Hewitt*, 59 Id. 634, note 657; extended note to *Williams v. Field*, 60 Id. 427-439, discussing the subject.

THE PRINCIPAL CASE WAS CITED IN *Olement's Appeal*, 49 Conn. 534, to the point that the power of a probate court, in its final decree settling an administration account, to correct any errors made in any former and partial settlement of the account, applies to errors of omission and improper charges and credits.

PEASE v. PEASE.

[35 CONNECTICUT, 131.]

THERE IS NO VARIANCE WHERE DECLARATION SETS OUT NOTE SIGNED BY ZELOTES TERRY, and proof is offered to show that it is the note of Zelotes Terry, Trustee for the East family of Shakers.

UNDER LAW OF MASSACHUSETTS, IF NEGOTIABLE INSTRUMENT IS EXECUTED BY AGENT IN HIS OWN NAME ALONE, though in behalf of an undisclosed principal, it cannot be enforced against the latter; therefore, upon principles of agency alone, a note given in that state by Zelotes Terry could not be enforced against Zelotes Terry, Trustee, etc. But as to the admissibility of parol evidence to charge an unnamed principal in a non-negotiable instrument, the law of that state seems to be unsettled.

IN MASSACHUSETTS, AND ELSEWHERE, ONE MAY MAKE NAME AND SIGNATURE OF ANOTHER VIRTUALLY HIS OWN, by using it or allowing it to be used in the course of his business; and where a party adopts a name, he will be holden by contracts executed in such name, whether the name so assumed be an artificial one or the proper name of a living person.

IN PRINCIPLE, THERE IS NO DIFFERENCE BETWEEN ASSUMING PURELY ARTIFICIAL NAME, by which to transact business, and assuming the proper name of some other natural person; only this, that in the latter case the proof ought to be very clear to show that the contract was not designed to be the personal contract of such natural person:

NEGOTIABLE NOTE SIGNED "ZELOTES TERRY" MAY BE PROVED BY PAROL to be the note of Zelotes Terry, Trustee for the East family of Shakers, not upon the ground of agency, but upon the principle that Zelotes Terry is the business name of the community.

NON-NEGOTIABLE INSTRUMENT SIGNED "ZELOTES TERRY, TRUSTEE," MAY BE PROVED BY PAROL to be the note of Zelotes Terry, Trustee of the East family of Shakers; for the words, "Zelotes Terry, Trustee," may mean something more than the mere name of the agent. They may be the corporate name of the community.

ADOPTION OF NAME SIGNED TO NEGOTIABLE NOTE MAY BE PROVED BY PAROL. A Shaker community in Connecticut, by law, and by the terms of a covenant signed by its members, transacted business in the name of a trustee appointed by the elders. A negotiable note, signed "Zelotes Terry," was given in Massachusetts for lands bought for the community. Terry was in fact a trustee at the time, and as a member of the community was disqualified from doing any private business. *Held*, that the case was to be governed by the laws of Massachusetts.

and that, while the principals would not be liable under those laws, if the signature were regarded simply as that of an agent to a negotiable note, yet the community might have adopted the name of Zelotes Terry as their business name, and that parol evidence was admissible to show that they had done so.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT NAME SIGNED TO NON-NEGOTIABLE INSTRUMENT IS CORPORATE NAME, and that Zelotes Terry, Trustee, means Zelotes Terry, Trustee for East family of Shakers. A non-negotiable instrument, given for land bought for the community, was signed "Zelotes Terry, Trustee." *Held*, that as the community was authorized to do business in the name of its trustee for the time being, and could sue and be sued in that name, and had no specific corporate name, the name of such trustee, with a term indicating his official character, was properly the corporate name of the community; and that parol evidence was admissible to show that Zelotes Terry, Trustee, meant Zelotes Terry, trustee of the community.

ASSUMPSIT against a Shaker community, known as the East family of Shakers, upon certain instruments set forth in the opinion. The plaintiff was Amos Pease, indorsee. The defendant upon the record was Omar Pease, as trustee of the East family of Shakers; and it was alleged that he was the successor of Zelotes Terry, late trustee of the community. The note and guaranties were averred to have been executed by the said late Zelotes Terry while he was trustee of the community, and in his capacity as such, and for the consideration of certain lands purchased by him as such trustee for the benefit of the community, and which were conveyed to him as such trustee. By the terms of a covenant signed by the members of the community, and by statute, all conveyances taken by the Shaker communities might be taken in the names of their trustees for the time being, and all suits might be brought by or against the communities under the name of such trustees; and they had no other corporate character or name. The covenant was put in evidence. The jury were instructed that the contracts were to be governed by the laws of Massachusetts; and, as requested in the seventeenth request, that if Terry was induced to purchase the land and execute the papers in suit by the fraud of Wolcott, or of any other person acting for him, the plaintiff could not recover. Other facts are sufficiently stated in the opinion.

Hyde and Robinson, for the plaintiff.

T. C. Perkins and M. P. Knowlton, for the defendants.

By Court, **LOOMIS, J.** The declaration in this case contains three special counts in *assumpsit*.

In the first count, the plaintiff, as indorsee, seeks to recover of the defendants, as makers, upon a promissory note in the following form: —

"\$1,500. On demand, for value received, I promise to pay to the order of Lyman Wolcott fifteen hundred dollars.

"March 6, 1862.

ZELOTES TERRY."

Indorsed on the back: "LYMAN WOLCOTT, without recourse."

The second count is upon a guaranty by the defendants for the payment of a promissory note, as follows: —

"SPRINGFIELD, March 31, 1859.

"\$400. For value received, I promise to pay Nathan Daman, or order, four hundred dollars, on demand, with interest annually.

R. M. ABBE."

Indorsed on the back: "I guarantee the payment of this note, waiving notice and demand.

"ZELOTES TERRY, Trustee."

The third count is upon a guaranty of another note, as follows: —

"\$1,300. For value received, we promise to pay Lyman Wolcott, or order, thirteen hundred dollars, as follows: four hundred dollars in one year from date, four hundred and fifty dollars in two years from date, and four hundred and fifty dollars in three years from date, with interest annually.

"SYLVIA B. WOOD,

"CHARLES B. WOOD.

"SPRINGFIELD, Feb. 16, 1861."

Indorsed on the back: "I guarantee the payment of this note to Lyman Wolcott, or order, waiving notice and demand.

"ZELOTES TERRY, Trustee."

"LYMAN WOLCOTT, without recourse."

Said notes and guaranties were executed in the state of Massachusetts. The evidence offered to support the first count was rejected by the superior court, and the jury returned a verdict for the plaintiff upon the second and third counts only. Both parties now ask for a new trial: the plaintiff, on account of the rejection of said evidence; and the defendant, on account of the rulings of the court upon the questions arising under the second and third counts.

The first question is, whether the court erred in rejecting the evidence offered by the plaintiff under the first count of the declaration.

In connection with the introduction of said first-described note, the plaintiff offered evidence to prove that Zelotes Terry, when he signed said note, and long before that time, was a duly appointed trustee for the East family of Shakers, located in Enfield in this state; that in giving and executing said note, he acted as trustee for said community of Shakers; that said note was given in part payment for land deeded to said Terry as trustee; and that the land so conveyed has ever since been held and occupied by the trustees for the use and benefit of said East family of Shakers; and that according to the forms and usages of said community, the trustees thereof were accustomed to sign contracts and other writings, executed by such trustees on behalf of said community, sometimes by their own names alone, and sometimes with the addition of the word "trustee."

The objections to this evidence which prevailed in the court below were, that there was a variance between the declaration and the proof thus offered; that the note on its face was the personal contract of Zelotes Terry, and not of Zelotes Terry, Trustee; and that parol evidence was not admissible to show that the note was executed as the note of Zelotes Terry, Trustee.

The declaration alleges "that on the sixth day of March, 1862, Zelotes Terry was trustee, for the time being, of the East family of Shakers, the community aforesaid; that on the sixth day of March, 1862, the said community, by the said Zelotes Terry, acting in his said capacity as trustee aforesaid, made a certain promissory note in writing, bearing date the said sixth day of March, 1862, and duly signed by the said Zelotes Terry, who then was trustee as aforesaid, and acting in said capacity, and thereby promised," etc. The evidence offered accords perfectly with the allegations in the declaration, and therefore the objection upon the ground of variance merely cannot prevail. The real question is, whether the declaration can be proved by parol evidence. Can a note signed "Zelotes Terry" be proved by parol to be the note of Zelotes Terry, Trustee for the East family of Shakers?

We will first consider the subject upon the principles of agency. We have a negotiable note signed by the agent in his own name, without disclosing his agency or naming his principal in any manner; and the question is, Can such a contract be enforced against the principal when subsequently discovered.

As this question goes to the right of the party, and not to

the remedy or judicial proceeding, and involves the nature, obligation, and construction of the contract, we must resort to the *lex loci* for its solution. And by the law of Massachusetts it is well settled that if a negotiable instrument is executed by an agent in his own name alone, though in behalf of an undisclosed principal, it cannot be enforced against the latter; because each party who takes a negotiable note makes a contract with the parties whose names appear on the face of the instrument, and with no other persons.

So that all evidence *dehors* the instrument, upon the question of agency, is to be excluded: *Stackpole v. Arnold*, 11 Mass. 27 [7 Am. Dec. 150]; *Bradlee v. Boston Glass Manufactory*, 16 Pick. 347; *Packard v. Nye*, 2 Met. 47; *Bedford Commercial Ins. Co. v. Covell*, 8 Id. 442; *Taber v. Cannon*, 8 Id. 460; *Fuller v. Hooper*, 3 Gray, 334; *Eastern R. R. Co. v. Benedict*, 5 Id. 565 [66 Am. Dec. 384]; *Bank of British North America v. Hooper*, 5 Id. 567 [66 Am. Dec. 390]; *Fiske v. Eldridge*, 12 Id. 474; *Williams v. Robbins*, 15 Id. 590.

If, therefore, this case were to be determined upon the principles of agency alone, the conclusion of the court would be correct.

But the record suggests another question, namely: Ought not the court to have allowed the evidence concerning this note to go to the jury as tending to show that Zelotes Terry was the business name of the defendants, by which they executed the note in question? If there was any legitimate evidence bearing on this point, it should have gone to the jury, because the law is well settled, by decisions in Massachusetts and elsewhere, that a man may make the name and signature of another virtually his own, by using or allowing it to be used as such in the course of his business: *Fuller v. Hooper*, 3 Gray, 334; *Bryant v. Eastman*, 7 Cush. 111; *Melledge v. Boston Iron Co.*, 5 Id. 158 [51 Am. Dec. 59]; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360; *Commercial Bank v. French*, 21 Pick. 486 [32 Am. Dec. 280]; *Lindus v. Bradwell*, 5 Com. B. 583; *Bank of Cape Fear v. Wright*, 3 Jones, 376.

The question is not whether the evidence was sufficient to have justified a verdict for the plaintiff, but whether there was any pertinent evidence improperly rejected. The weight of the testimony would doubtless be impaired by the fact that the business name (if any) here employed was not a purely artificial one, as is usual in such cases, but the name of a natural person, who, in the eye of the law, was competent to

contract on his own account. But in principle there is no difference between assuming a purely artificial name, by which to transact business, and assuming the proper name of some other natural person; only this, that in the latter case, the proof ought to be very clear to show that the contract was not designed to be a personal contract of such natural person.

Evidence was offered to show that according to the forms and usages of the community of Shakers, the trustees were accustomed to sign contracts and other writings, executed by them on behalf of the community, sometimes by their own names alone, and sometimes with the addition of the word "trustee." And in connection with this evidence, it was shown that the community adopted this particular act of Terry, by retaining and enjoying the consideration of the note. And to rebut the presumption that the note in question was the personal note of Terry, there was the evidence furnished by the Shaker covenant to show that Zelotes Terry, as a member of the community, could not and did not own any worldly property, and that he could make no contract except in behalf of the community; and that under the covenant, there could be no such person, known to the business world, as Zelotes Terry, individually. The evidence (had it been received) might also have been strengthened somewhat by a consideration of the peculiar legal character of the defendants.

The statute (Gen. Stats., p. 138) allows the community to appear in court, either to sue or defend, only in the name of the natural person who is trustee for the time being. Therefore the name "Zelotes Terry" (if he was in fact trustee) was an essential part of the legal or corporate name of the defendants; and its use, in this instance, would not carry with it so strong a presumption that it was the individual transaction of Terry as it would under other circumstances.

Our conclusion therefore is, that the court erred in rejecting the evidence referred to, and that the plaintiff is entitled to a new trial. This would open the whole case, and give the defendants also the benefit of another trial. But it may be important with a view to another trial to settle some of the questions which the defendants' motion presents.

The defendants ask for a new trial on account of erroneous instructions to the jury; and the question is, Were the instructions "correct, adapted to the issue, and sufficient for the guidance of the jury in the case before them"? *Waters v. Bristol*, 26 Conn. 398. The defendants made seventeen spe-

cific requests relative to the instructions to be given to the jury. Of these requests, the first (which relates to the law by which the contracts in question were to be construed and their validity determined) and the seventeenth (relative to fraud) were substantially complied with in the charge as given. The other requests, from the second to the sixteenth, inclusive, comprise three points, viz.: 1. The law relative to the trusteeship; 2. That relative to ratification by the Shaker community; 3. That relative to the notes and guaranties in suit.

1. In relation to the trusteeship there were no instructions, except that the jury were to find whether it existed or not. It was assumed to be a pure question of fact, and not a mixed question of law and fact. No reference was made to the number of trustees required by the covenant, nor to the mode of appointment, extent of authority, or to any of the circumstances necessary to constitute a legal trustee. Some instructions were called for on these points, both by the nature of the case and in consequence of claims made by the defendants at the trial.

The defendants made the distinct claim founded on the covenant which was in evidence, that the trustees could only be appointed by the ministry and elders, and that no such appointment had been made in the case of Zelotes Terry; that even if the jury should find that Terry was a regularly appointed trustee, and there were at the time one or more other trustees of the East family, it would require a majority of the trustees concurring to bind the community; that as the covenant provided for the appointment of deacons or trustees of more limited authority to take charge of the domestic affairs of the community, the instructions ought to have been such as to enable the jury to distinguish between such limited authority and the more general and important authority to buy and hold real estate. The covenant also required the trustees to consult the ministry and elders on important matters, and as the defendants offered evidence to show that they were not consulted as to the acts in question, and made a specific request relative to this point, the instructions ought to have been such that the jury could judge whether or not there was any limitation on the authority of Terry to bind the community, so far as the case depended upon previous authority.

2. The instructions relative to the law of ratification by the Shaker community were such as might have induced in the

minds of the jury the erroneous belief that a general recognition of Terry's acts as trustee, though in matters pertaining to the domestic affairs of the community, might be sufficient, or that "any manner" of ratification was sufficient, when the ground of ratification ought to have been confined to the particular acts in question, or at least to similar acts.

3. The remaining requests, as already stated, raise certain questions of law relative to the notes and guaranties in the second and third counts, viz.: Does the law of Massachusetts govern the construction of these guaranties, signed "Zelotes Terry, Trustee"? and if so, are they the personal contracts of Zelotes Terry alone, so that all parol evidence is inadmissible to charge the defendants?

That the law of Massachusetts must govern the case has already appeared. And by that law, if the instrument is a negotiable one, and the name of the principal does not appear upon it, it is held to be the contract of the signer alone, though he adds to his name the word "trustee" or "agent."

The guaranty in the third count mentioned, being written on the back of a negotiable note, and being for the payment of the note to Lyman Wolcott or order, is clearly a negotiable instrument, and as such, is governed by the rule just stated. This guaranty, therefore, became the personal contract of Zelotes Terry, unless Zelotes Terry, Trustee, was either the corporate or the business name of the defendants, which might be shown by parol evidence. But the name of the defendants was in dispute, and the jury might find that the name signed to the guaranty was not the name of the defendants; which would leave the case to rest entirely upon the principles of agency. The defendants therefore were entitled to the benefit of their claim,—that it was a mere case of agency, and that if the jury found as claimed by them, the law was so that the plaintiff could not recover.

The charge of the court was silent with respect to the construction of the contract by the law of Massachusetts; or if the charge as given covered this subject,—"that the plaintiff could recover on the second and third counts, notwithstanding the defendants' objection to the form of the notes and guaranties,"—then it amounted to a denial of the defendants' claim on this point; and in either case the defendants are justly aggrieved. We think the court ought to have instructed the jury, not only that the law of Massachusetts governed the case, but particularly what the law was as applicable to the

facts in issue: *Hale v. New Jersey Steam Navigation Co.*, 15 Conn. 539 [39 Am. Dec. 398]; *Lockwood v. Crawford*, 18 Id. 361.

The guaranty in the second count, signed "Zelotes Terry, Trustee," not being negotiable, raises the question whether by the law of Massachusetts parol evidence is admissible to charge the defendants as principals upon an instrument not negotiable, upon the face of which the defendants are not mentioned.

There is no difficulty, as we have already seen, in admitting parol evidence to show that Zelotes Terry, Trustee, was the legal or the business name by which the defendants executed the guaranty. But considering the case upon the principles of agency merely, we find the authorities in Massachusetts leave the law upon this subject in doubt as to written instruments not negotiable.

One of the leading cases in Massachusetts upon this subject is that of *Stackpole v. Arnold*, 11 Mass. 27 [6 Am. Dec. 150]. This was an action upon a negotiable note, signed by the agent alone in his own name, without any addition or indication on the face of it that he acted in behalf of the principal, who was defendant in the case; but Parker, J., in giving the opinion of the court, makes no mention of the negotiable character of the note, but reasons in general terms applicable to all written contracts, not negotiable as well as negotiable, stating the rule as follows: "No person in making a contract is considered to be the agent of another unless he stipulates for his principal by name, stating his agency in the instrument which he signs."

On the contrary, in *Huntington v. Knox*, 7 Cush. 371, Shaw, C. J., seems to state an opposite doctrine in terms equally broad and positive, viz.: "Where a contract is made for the benefit of one not named, though in writing, the latter may sue on the contract, jointly with others or alone, according to the interest. The rights and liabilities of a principal upon a written instrument executed by his agent do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts, first, that the act is done in the exercise, and second, within the limits, of the powers delegated; and these are necessarily inquirable into by evidence." The reasoning in the latter case is apparently irreconcilable with that in the former case, — sufficiently so to overrule it; but Chief Justice Shaw, in giving the above opinion, did not refer at all to

Stackpole v. Arnold, *supra*, and the courts of Massachusetts have never considered the latter case overruled; but the later decisions limit and restrain the reasoning in each to the particular facts of the case; in *Stackpole v. Arnold*, *supra*, to the negotiable character of the instrument; in *Huntington v. Knox*, *supra*, to the fact that it was an action to recover the price of certain bark sold and delivered to the defendant, upon a writing by which one George H. Huntington acknowledged to have received of the defendant a partial payment of twenty-five dollars, and in consideration thereof agreed to deliver to the defendant the bark in question, at a certain time and place, and for a specified price. The action was brought for the price of the bark, and was not directly upon the written contract.

In the case of *Eastern R. R. v. Benedict*, 5 Gray, 561 [66 Am. Dec. 384], the action was upon the following written order: "Please give Mr. D. A. Neal, president of the Eastern Railroad Company, stock in the Salem Gas Company, at par, to the amount of seven thousand dollars. Leonard Fuller." This suit was sustained in favor of the Eastern Railroad Company, upon parol evidence that the order was in fact for the benefit of the company. Dewey, J., in giving the opinion, says: "We may assume it to be quite clear, and well supported by authority, that in the case of oral contracts the principal may sue in his own name upon a contract made with his agent. It is equally well settled that the same rule applies to sales by written bills or other memoranda made by the agent using his own name and disclosing no principal"; and after citing authorities, adds: "It is unnecessary in the present case to decide whether upon a mere naked written promise made with one person without any reference in the instrument to an agency, the action upon proof of such agency in fact might be maintained in the name of the principal."

In the case of *Fuller v. Hooper*, 3 Gray, 334, Metcalf, J., says: "The rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue, on a negotiable instrument, can be shown by parol evidence. In other simple contracts the rule is different."

In the case of *Williams v. Robbins*, 16 Gray, 79, Hoar, J., in giving the opinion, after referring to the case of *Stackpole v. Arnold*, 11 Mass. 27 [6 Am. Dec. 150], in its application to negotiable paper, says: "That decision has been repeatedly

recognized and confirmed in subsequent cases, although the reasoning of the judge who gave the opinion would lead to the application of the doctrine to contracts not negotiable, which later decisions do not countenance or even expressly exclude."

In *Page v. Stone*, 10 Met. 160 [43 Am. Dec. 420], it seems to have been conceded by counsel, and not discussed in the argument, that a note signed "A. F., for the assignees," was sufficiently signed to bind the persons to whom A. F. had assigned his property in trust for his creditors, or such of them as had authorized him to make the note. And Hubbard, J., in giving the opinion, says: "We think it was properly left to the jury to determine what was meant and understood by the words 'A. F., for the assignees.'"

Our examination of the cases cited and other authorities in Massachusetts leads to this conclusion, that if we are to consider the words "Zelotes Terry, Trustee," as the name merely of the agent of the defendants, there is no decision in that state which covers this case. The authorities generally recognize an important distinction between negotiable and non-negotiable instruments, as to the admissibility of parol evidence to charge an unnamed principal; but in the case of express written contracts, where the action is founded directly upon the written contract, there is still doubt to what extent they will go in admitting such evidence. We observe a tendency in the reasoning of the judges to place their decisions on the same ground as the English judges do, and we regard the decisions in England upon this subject as broad enough to cover such a case as this: *Sims v. Bond*, 5 Barn. & Adol. 393; S. C., 2 Nev. & M. 616; *Peckham v. Drake*, 9 Mees. & W. 79.

But we are not prepared to declare, as the law of Massachusetts, that which her own courts have hesitated to announce; and we think the case can be considered in another aspect, where the law is not in doubt.

The facts presented by the record in this case show that the words "Zelotes Terry, Trustee," signed to the guaranty, may mean something more than the mere name of the agent. In ordinary cases such would undoubtedly be the import of the words used.

But what is the true legal or corporate name of the defendants? Not "East family of Shakers," as we would commonly call them; nor "Brethren and Sisters of the United Society of Believers," as called in the "Covenant"; but as we have already stated, it is the name of the person who is the trustee

for the time being, with the addition, to make it complete, of the words "Trustee for the East family of Shakers," or equivalent words. The statute, it is true, only gives the name as one by which the defendants must sue and be sued; but it is the proper name by which to contract also; it is the only corporate name.

The words "Zelotes Terry, Trustee," being then an essential part and the main part of the corporate name of the defendants, it cannot be said that the addition of the word "trustee" is necessarily merely *descriptio personæ*; and the instrument in question being non-negotiable, there is no difficulty in admitting evidence *dehors* the instrument, by parol, to show that it was the Shaker trustee that was meant, and that the guaranty was in behalf of the community, and that the name used signified the community; so that, in language similar to that used by Hubbard, J., in *Paige v. Stone*, 10 Met. 160 [43 Am. Dec. 420], it might be left to the jury to determine upon the evidence what was meant and understood by the words "Zelotes Terry, Trustee"; and if the jury should find that they meant the defendants who were represented by a lawful trustee, acting in their behalf within the limits of his authority, it would undoubtedly be sufficient to make the defendants liable on the guaranty in the second count.

We advise a new trial in behalf of both parties.

In this opinion the other judges concurred.

PRINCIPAL CANNOT SUE OR BE SUED ON NEGOTIABLE PAPER IF HIS NAME DOES NOT APPEAR THEREON: See note to *Bank etc. v. Hooper*, 66 Am. Dec. 394; note to *Eastern R. R. Co. v. Benedict*, 66 Id. 339; note to *Slawson v. Loring*, 81 Id. 754; note to *Williams v. Robbins*, 77 Id. 400. In *Morse v. Green*, 38 Id. 471, it is held that the fact of agency need not appear from signature, where one party signs a note as agent for another.

UNDISCLOSED PRINCIPAL MAY SUE OR BE SUED WHEN, ON CONTRACT MADE BY OR WITH AGENT, TRUSTEE, ETC.: See note to *Eastern R. R. Co. v. Benedict*, 66 Am. Dec. 389; *Smith v. Plummer*, 34 Id. 530; note to *Williams v. Robbins*, 77 Id. 400; *Merchants' Bank v. Central Bank*, 44 Id. 665.

PAROL EVIDENCE IS ADMISSIBLE TO DETERMINE TRUE CHARACTER OF INSTRUMENT, where the signature is equivocal, and may import either an individual or a corporate obligation: *Keas v. Davis*, 47 Am. Dec. 182; but not where the contract is free from ambiguity on its face: *Ruis v. Norton*, 60 Id. 618.

ADOPTION OF NAME FOR BUSINESS PURPOSES: See note to *Williams v. Robbins*, 77 Am. Dec. 401.

NEGOTIABLE INSTRUMENTS ARE GOVERNED BY LAW OF PLACE where they are expressly made payable: *City of Aurora v. West*, 85 Am. Dec. 413.

LEX LOCI CONTRACTUS GOVERNS AS TO CONSTRUCTION OF CONTRACTS; while the *lex fori* governs as to the form of action or remedy: See note to *Heferlin v. Sinsinderfer*, 85 Am. Dec. 595.

THE PRINCIPAL CASE WAS DISTINGUISHED from *Hall v. Bradbury*, 40 Conn. 37, a case of ordinary agency.

EASTERLY v. GOODWIN.

[85 CONNECTICUT, 279.]

DEBTOR'S DISCHARGE UNDER INSOLVENT LAW OF ONE STATE CANNOT OPERATE TO DISCHARGE HIM FROM CLAIM OF CREDITOR WHO IS CITIZEN OF ANOTHER STATE, notwithstanding the fact that the debt was contracted in the state where the discharge was granted; or that the creditor had obtained judgment on the debt in that state.

TEMPORARY RESIDENCE ONLY IS SHOWN BY FACTS OF THIS CASE. A temporary residence in a state does not change its character by being long continued; and the fact of voting in the state is not necessarily decisive of the character of the residence.

SUPREME COURT OF ERRORS OF CONNECTICUT NEVER REVIEWS QUESTIONS OF FACT. It takes them as they are found by the court below.

DEBT on a judgment recovered in the state of California. There was notice of a discharge obtained in California after the judgment was rendered, under the laws of that state. Easterly recovered judgment against Goodwin, in California, in May, 1858, for \$7,044.70, and costs. This judgment was still in force unless annulled by the insolvent proceedings mentioned below. The contract upon which the judgment was rendered was entered into between the plaintiff and the defendant in 1856, in California. It was an accommodation indorsement by Easterly for Goodwin of Goodwin's note, payable in California, but which was not paid by Goodwin at maturity, and which was afterwards paid by Easterly, as indorser. Before and at the time when the contract was made, and until after the rendition of the judgment, Easterly was transiently in California and Goodwin resided there. In 1859 Goodwin procured an insolvent's discharge under the laws of California from all his debts, including Easterly's claim. This discharge was regularly obtained and granted, and in that year Goodwin took up his residence in Connecticut, where he had formerly resided up to 1849. Other facts are stated in the opinion. The case was reserved for the advice of this court.

C. E. Perkins, for the plaintiff.

Welch and Shipman, for the defendant.

By Court, PARK, J. The case of *Ogden v. Saunders*, 12 Wheat. 213, decides that a state has not the constitutional power to discharge its citizens by a bankrupt or insolvent law from contracts made with them by citizens of other states. Judge Johnson, in giving the opinion of the court and commenting upon the authority of a state to pass bankrupt or insolvent laws, says that "as between citizens of the same state, a discharge of a bankrupt is valid as it affects posterior contracts; as against citizens of other states it is invalid as to all contracts."

This view of the case of *Ogden v. Saunders*, *supra*, was taken by this court in the cases of *Norton v. Cook*, 9 Conn. 314 [23 Am. Dec. 342], and *Anderson v. Wheeler*, 25 Id. 603; and by the courts of other states in the cases of *Poe v. Duck*, 5 Md. 1; *Donnelly v. Corbett*, 7 N. Y. 500; and *Whitney v. Whiting*, 35 N. H. 457.

The principle of the case of *Ogden v. Saunders*, *supra*, has been reaffirmed by the supreme court of the United States in the recent cases of *Baldwin v. Hale*, 1 Wall. 223, and *Gilman v. Lockwood*, 4 Id. 409, and may be regarded as permanently settled.

The discharge in this case was obtained in California, under the insolvent laws of that state, by the defendant, who was a citizen of that state at the time the contract in question was made between him and the plaintiff in this suit, and continued to be till after the discharge in question was obtained.

The case finds that during all this time the plaintiff was a citizen of the state of New York, and never was a citizen of the state of California; that he was transiently there when the contract was made and when the judgment was obtained by him against the defendant, and then returned to the state of New York, where his family resided, and was there during the time that the proceedings were pending for the discharge of the defendant in the state of California.

From these facts, it is evident that the discharge is ineffectual to extinguish the claim of the plaintiff, unless other facts appear sufficient to take the case from the operation of the principle established by the cases referred to.

The defendant insists that the following facts found by the court render the condition of the plaintiff in California equivalent to that of a citizen, and sufficient to make the discharge effectual, notwithstanding the finding that he was at the same time a citizen of the state of New York. These facts are found

by the court as follows: "That said Easterly went to the state of California on business in the year 1850, and resided there at intervals until the year 1854, and that he again went there on business in 1855, and resided there until the fall of 1858; but that he went there only for temporary purposes, and never intended to remove his domicile there or remain there permanently, but intended to return to the state of New York when the business was concluded; and that during the time he was there he voted one or more times in the state."

No doubt the length of time the plaintiff remained in California, and his exercise of the elective franchise while there, were important facts upon the question of citizenship, and unless controlled by other evidence of a superior character would have been sufficient to warrant the court in finding that he was a citizen of that state. But the defendant claims that these facts constitute citizenship as matter of law, and we are referred to the case of *Shelton v. Tiffen*, 6 How. 163, as sustaining the claim. The court in that case say: "On a change of domicile from one state to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is not conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location unexplained, may be sufficient. The facts proved in this case authorize the conclusion that Shelton was a citizen of Louisiana within the act of Congress, so as to give jurisdiction to the circuit court." The question in the case was whether the circuit court had jurisdiction of the case, and this depended upon the citizenship of the appellant. It is well known that the appellate courts of the United States review the questions of fact made in the case, enough to see whether the conclusions arrived at by the court below are warranted by the evidence. In the case cited, the court review the evidence at length upon the question of citizenship, and use the language quoted in commenting upon the weight of the evidence. These remarks apply with equal propriety to the case of *Gassies v. Ballou*, 6 Pet. 762, and that of *Dred Scott*, 19 How. 293, cited by the counsel for the defendant. It is unnecessary to state that this court never reviews questions of fact. It takes them as they are found by the court below. The cases referred to do not, therefore, support the claim.

The defendant further claims that there is a broad distinc-

tion between a casual presence in a state and that continuous, voluntary abiding which constitutes a residence; and that, in respect to the latter, is sufficient for the purposes of this case, and will give efficacy to the discharge. The finding of the court is, that the residence of the plaintiff in the state of California was temporary, and that during the time it continued, his domicile and citizenship remained in another state.

A temporary residence does not change its character by lapse of time. Whether it is longer or shorter, it is temporary still. It possesses no elements of a superior state which time will mature. We see nothing in this claim of the defendant.

The defendant further insists that if the plaintiff had an extraterritorial constitutional immunity in respect to his original claim, he abandoned and lost it by voluntarily going into the courts of California and recovering judgment upon the claim. In support of this position, he refers us to the case of *Davidson v. Smith*, decided in the United States district court for the state of Wisconsin, and reported in 1 Biss. 346; S. C., 9 Am. Law Reg. 223. It is true that this case is in point, and the decision directly in favor of the defendant. But it should be observed that the judge, in giving his opinion, relies very much upon the case of *Parkinson v. Scoville*, 19 Wend. 150, and does not notice the recent cases on the subject in which the contrary doctrine is held. The case of *Parkinson v. Scoville*, *supra*, was substantially overruled by the late case of *Baldwin v. Hale*, 1 Wall. 223.

The defendant also refers to the case of *Ogden v. Saunders*, 12 Wheat. 213, in support of his claim. But this question was not involved in that case, and although Justice Johnson in giving the opinion of the court departs from the case and expresses an opinion upon the question, still under the circumstances the opinion is not entitled to much consideration. He says, alluding to the case of *Watson v. Bourne*, 10 Mass. 337 [6 Am. Dec. 129]: "I have little doubt that the court was wrong in denying the effect of a discharge as against judgments rendered in the state courts where the party goes voluntarily and unnecessarily into these courts." This remark of the judge, as will be seen upon an examination of the case, is purely an *obiter dictum*. On the other hand, the cases of *Poe v. Duck*, *Donnelly v. Corbett*, *Whitney v. Whiting*, and *Watson v. Bourne*, *supra*, decide this question in favor of the plaintiff. They hold that the extraterritorial constitutional immunity which exists in the plaintiff upon the original contract

is not affected by a recovery of the judgment upon that contract in the courts of the state where it was made. The immunity of the contract continues and inheres in the judgment. We think the weight of authority is decidedly upon this side of the question.

We advise the superior court to render judgment for the plaintiff.

In this opinion the other judges concurred.

DISCHARGE UNDER INSOLVENT LAWS OF ONE STATE, EFFECT OF IN ANOTHER: See *Fessenden v. Willey*, 79 Am. Dec. 762, note 765; *Felch v. Bugbee*, 77 Id. 203; *Peck v. Hibbard*, 62 Id. 605; note to *Mason v. Wash*, 12 Id. 141. Discharge in insolvency does not affect non-residents: Note to *Upton v. Hubbard*, 73 Id. 676. But as to effect of foreign discharge in bankruptcy, see extended note to *Peck v. Hibbard*, 62 Id. 611-613, where the subject is discussed.

RESIDENCE, CITIZENSHIP, ETC., WHAT CONSTITUTES—TEMPORARY ABSENCE NOT SUFFICIENT TO CONSTITUTE PARTY NON-RESIDENT WHEN: See extended note to *Frost v. Brisbin*, 32 Am. Dec. 427-429; *Gilman v. Gilman*, 83 Id. 502; *Langdon v. Doud*, 83 Id. 641, note 644; *Inhabitants of Warren v. Inhabitants of Thomaston*, 69 Id. 69, note 74; extended note to *Ringgold v. Barley*, 59 Id. 111-115; *Hairston v. Hairston*, 61 Id. 530; note to *Haggart v. Morgan*, 55 Id. 355.

REDFIELD v. BUCK.

[35 CONNECTICUT, 328.]

NEW TRIAL WILL NOT BE GRANTED FOR IMPROPER ADMISSION OF EVIDENCE, where it is clear that the case could not have been affected by it.

DECLARATIONS OF VOLUNTARY GRANTOR, MADE DURING GRANTOR'S ABSENCE AND WITHOUT HIS KNOWLEDGE, that he was insolvent when the deed was made, are not admissible against the grantee for the purpose of showing the conveyance to be fraudulent against creditors.

ACTS OF OWNERSHIP AND DECLARATIONS OF GRANTOR REMAINING IN POSSESSION, ADMISSIBILITY OF IN EVIDENCE. — Where a grantor remains in possession and manages the property as before, and the question is whether he is occupying as owner or as agent of the grantee, his acts of ownership are admissible in evidence against the grantee, and his declarations made in connection with them are also admissible as explanatory of them.

CONVEYANCE BY INSOLVENT, WHEN CONSTRUCTIVELY FRAUDULENT AGAINST CREDITORS. — Conveyance by insolvent of all his property, or substantially all, in consideration of love and affection only, is constructively fraudulent against subsequent as well as existing creditors.

ERRONEOUS ENTRY OF CLERK AS TO TIME FOR NEW TRIAL, EFFECT OF. — Where a motion for a new trial was taken to the "next term" of the supreme court to be holden in the county, without describing the term, and the next term was that of September, 1867, to which term alone the motion could by law be taken, and the clerk of the court in his record

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had described the term to which it was taken as "the next term to be holden on the second Tuesday of February, 1868," at which latter term he entered the case on his docket, it was held, on a motion to strike the case from the docket, that the motion for a new trial was to be regarded as taken to the September term, and the clerk's entry as an error, and that the case should be treated as if it had been entered in the docket of the September term and properly continued.

EJECTMENT. Plaintiff, J. E. Redfield, claimed title to the demanded premises by virtue of the levy of an execution issued on a judgment obtained against W. J. Buck, the defendant's brother, in 1865, on certain promissory notes made by him in 1859. The defendant, Sarah M. Buck, claimed title under two quitclaim deeds executed and delivered to her by her brother in December, 1853. It appeared that the defendant was a maiden sister of the grantor; that she was dependent upon and supported by him; that most of the time she resided with and in his family; that a more than ordinary affection existed between them; and that about 1834, in consideration of love and affection for her, and for the purpose of making her more independent, he had transferred to her two thousand or three thousand dollars' worth of stock. She then believed him to be in easy circumstances, and worth some fifty thousand dollars. She kept the stock until 1837, when the grantor became insolvent, and at his request she retransferred the stock to him, to do with it as he pleased. Defendant claimed to have proved that at the time of retransfer it was understood between them that at some future time he would reimburse her for the stock; that this promise was afterwards renewed; that the deeds in question were executed and delivered to her for that purpose, and that only; and that the deeds were therefore not voluntary, but given for a valid and valuable consideration. The insolvency of Buck dated from 1837. Verdict for plaintiff, and defendant moved for a new trial. When the case came up for argument, plaintiff moved that it be stricken from the docket, and relied upon *Phelps v. Norton*, 35 Conn. 327. The grounds of the motion will appear from the last section of the *syllabus*, *supra*, and also the ruling of the superior court upon the point. While this point is not adverted to in the opinion herein, a new trial was not advised, and we are to infer that the decision of the lower court on this point was approved. Other facts are stated in the opinion.

C. Ives and Alling, in support of the motion for a new trial.

Culver and Wilcox, *contra*.

By Court, HINMAN, C. J. This was an action of disseisin, in which both parties claimed title under William J. Buck,—the plaintiff by virtue of the levy of an execution, and the defendant under deeds from him,—and the question in the case was, whether those deeds were operative to convey the title against the claim of the plaintiff, a creditor of the grantor.

On the trial below, questions in respect to the admissibility of evidence were made and decided, which will first be considered. The claim of the plaintiff was, that the deeds to Sarah M. Buck, the defendant, from her brother were made without any valuable consideration therefor, and at a time when he was largely indebted, and was in fact insolvent, and being entirely voluntary, were void against his creditors; and he claimed to prove the insolvency of Buck by his declarations, made in the absence and without the knowledge of his sister.

We know of no principle of law upon which this evidence was admitted. Still, as it was offered and received only for the purpose of proving the insolvency of the maker of the deeds at the time they were executed, and was not claimed to be evidence for any other purpose whatever, and as this insolvency at the time was abundantly shown by other evidence in the case, and was even expressly admitted by the defendant, who testified to it, and that she had no knowledge that he possessed any other property at the time the deeds were made, we cannot perceive how the evidence could have prejudiced her case in the estimation of the jury, and on this ground alone we do not advise a new trial on account of the admission of it.

Again, Buck, the maker of these deeds to his sister, appears to have managed the property after the deeds were made, in the same manner that he had done while he was the real as well as the apparent owner of it; and to rebut the defendant's claim that his continued management of it was in the capacity of agent for her, and not as owner of it, the plaintiff was permitted to prove that in the year 1859 or 1860 he claimed the property as his own, and as such offered to sell it.

This claim of Buck to own the property, and his offer to sell it at a time when, on the trial, the defendant claimed that he was managing it as her agent, but as the plaintiff claimed as owner, and just as he had managed it before the execution of the deeds, was in our opinion admissible for the purpose of proving that he was in fact the owner, notwith-

standing the deeds to her. His continued management showed, as remarked by Judge Storrs in *Avery v. Clemons*, 18 Conn. 309 [46 Am. Dec. 323], those acts which naturally and usually flow from and accompany the ownership of property, and therefore tend to evince such ownership. But the acts themselves were to some extent equivocal, being equally consistent with the defendant's claim of agency, and the plaintiff's claim of ownership in the party thus managing the property. And his declarations accompanying his management were admissible for the purpose of showing the character of it. They were therefore proper and necessary in order to prove the character of his possession and management, and except in the immaterial circumstance that the possession in this case was of real estate, while in *Avery v. Clemons, supra*, it was of personal property, the cases can hardly be distinguished, and there was therefore no error in admitting these declarations in evidence.

But the charge to the jury is objected to. The plaintiff's claim was, that as the deeds to the defendant were voluntary, and executed when the grantor was largely indebted and insolvent, and as they embraced all his visible property, these facts unexplained were sufficient to render the conveyances fraudulent and void against him, a subsequent creditor. The defendant claimed that if the deeds were given in consideration of love and affection alone, when the grantor was insolvent, and no secret trust or actually fraudulent intent to defeat future creditors was proved, the defendant would be entitled to hold the property against the plaintiff, and she requested the court so to charge the jury. The court recognized the plaintiff's claim as substantially correct, in charging the jury that when conveyances were made by a grantor who was largely indebted and insolvent, and the property conveyed was all or nearly all he possessed, and the conveyances were wholly gratuitous and without other consideration than love and affection, they were void as to subsequent as well as to antecedent creditors. The doctrine of the charge is, that a gift by an insolvent of all his property in consideration of love only is constructively fraudulent against creditors, without reference to the time when the indebtedness arises; and it would certainly seem, upon general principles, and without reference to decided cases, that this must be so. If a man must be just before he is generous, it clearly ought to be so. One largely indebted and insolvent, who gives away his only means of satisfying in part the claims

of his creditors, must be either incapable of managing his affairs and incompetent to make a conveyance, or he must do it under some secret hope or expectation of benefit to himself from the use of the property, or some equivalent for it, after the conveyance; and in this case the transaction is corruptly fraudulent. That such a conveyance must directly tend to hinder, delay, and defeat creditors is too clear for argument. And the grantee in such a conveyance, knowing, as this grantee did, the pecuniary condition of her brother, and that the property conveyed was his only visible means of paying his debts, must have received the deeds as a merely colorable transfer; and most probably would have conveyed it back to him on request, as she appears to have done with the manufacturing stock, which had also been conveyed to her. If, then, fraud is an inference of law from facts and intent, as was said in *Pettibone v. Stevens*, 15 Conn. 26 [38 Am. Dec. 57], it would seem from the conceded facts in the case that the plaintiff must recover this property. It cannot be necessary to review the numerous cases on this subject. The remark of Judge Washington, in *Ridgeway v. Underwood*, 4 Wash. C. C. 137, contains law enough to dispose of the case. "So," says he, "if the grantor at the time the deed was made was indebted to the extent of insolvency, or perhaps of great embarrassment, so as to create a reasonable presumption of a fraudulent design, the deed may be impeached even by a subsequent creditor, unless the presumption is repelled by showing that such prior debts were secured by a provision in their favor in the deed itself."

We do not advise a new trial.

In this opinion the other judges concurred.

NEW TRIAL WILL NOT BE GRANTED FOR IMPROPER ADMISSION OF EVIDENCE, unless it has prejudiced the complaining party: *Mitchell v. Bromberger*, 90 Am. Dec. 550, note 554; *Adams v. Blodgett*, 90 Id. 569; *Winona etc. R. R. Co. v. Waldron*, 88 Id. 100; *Hovey v. Chase*, 83 Id. 514.

ACTS OF OWNERSHIP AND DECLARATIONS OF GRANTOR REMAINING IN POSSESSION, ADMISSIBILITY OF IN EVIDENCE: See *Grant v. Lewis*, 80 Am. Dec. 785; *Martin v. Hardesty*, 62 Id. 773; *McDowell v. Goldsmith*, 61 Id. 305; *Darling v. Bryant*, 52 Id. 162; *Thompson v. Mawhinney*, 52 Id. 176; *Abney v. Kingsland*, 44 Id. 491; *Nelson v. Iverson*, 60 Id. 442, note 449. These cases show that declarations by party in possession of property, whether real or personal, descriptive or explanatory of such possession, are usually admitted in evidence as part of the *res gesta*; but that his declarations beyond this are no part of the *res gesta*, and cannot be received as such. A witness may testify to fact of ownership: *Nelson v. Iverson*, 60 Id. 442. Declarations of

grantor are admissible as part of *res gestæ* against grantee, if they tend to show fraud in the making of the deed; and though made to the conveyancer who prepared the deed, but not in the grantee's presence, may be received in a case where the grantor's creditors seek to vacate the deed as fraudulent against them: *McDowell v. Goldsmith*, 61 Id. 305; *Grant v. Lewis*, 80 Id. 785.

RETENTION OF POSSESSION OF PROPERTY BY INSOLVENT GRANTOR IS BADGE OF FRAUD, and the burden of rebutting this presumption of fraud is on him: *Grant v. Lewis*, 80 Am. Dec. 785; *Peck v. Land*, 46 Id. 368; *Richmond v. Crudup*, 33 Id. 164; note to *Eagle v. Eichelberger*, 31 Id. 450. That such possession, however, may be explained, see *Richmond v. Crudup*, 33 Id. 164; note to *Peck v. Land*, 46 Id. 379.

VOLUNTARY CONVEYANCE IS PRESUMED TO BE FRAUDULENT AS TO EXISTING CREDITORS; but as to subsequent creditors, fraud in fact must be established: See note to *Belford v. Crane*, 84 Am. Dec. 163; *Hutchison v. Kelly*, 39 Id. 250; *Savage v. Murphy*, 90 Id. 733. In *Lang v. Brown*, 56 Id. 244, it was held that a voluntary deed made by a mother to her children, on a consideration of natural love and affection, at a time when she was indebted to the complainant, was void as to him. In *Savage v. Murphy*, 90 Id. 733, circumstances are given under which a deed by one in debt to his wife and children was held fraudulent and void as to subsequent creditors. A voluntary conveyance, fraudulent as to the grantor's creditors by reason of his embarrassed condition at the time of conveyance, cannot be upheld because made in pursuance of a promise given when the grantor was unembarrassed: *Rucker v. Abell*, 48 Id. 406.

THE PRINCIPAL CASE WAS CITED IN each of the following authorities, and to the point stated: The declarations of the plaintiff, in an action against an attaching officer for taking personal property of the plaintiff as the property of another, are admissible to control the inference of fraud arising from the fact that the property, after an alleged sale to the plaintiff, remained in the custody of his son, the vendor; not as proof of the facts alleged, but as part of the *res gestæ*, and tending to show that the possession and acts of the son were those of an agent: *Place v. Gould*, 123 Mass. 349. The erroneous admission of a court docket in evidence is no ground for a new trial, where its admission worked no prejudice to the complaining party: *Bradley v. Vail*, 48 Conn. 382.

PACKER v. BENTON.

[85 CONNECTICUT, 243.]

INDEBITATUS ASSUMPSIT WILL LIE ON ABSOLUTE CONTRACT TO PAY—SUCH CONTRACT IS NOT AFFECTED BY USE OF WORD "GUARANTEE" WHEN. — Where a person not before liable agrees "to pay and guarantee" the debt of a third person, and as part of the arrangement the original debtor is discharged from his indebtedness, the word "guarantee" is not to be understood in a technical sense; the agreement is an absolute one to pay, and *indebitatus assumpsit* will lie.

PROMISE, IN STATUTE OF FRAUDS, TO ANSWER FOR DEBT, ETC., OF ANOTHER MEANS an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable.

PROMISE TO ANSWER FOR DEBT OF ANOTHER IS WITHIN STATUTE OF FRAUDS WHEN AND WHEN NOT.—Where a person not before liable agrees to pay the debt of a third person, and as a part of the arrangement the original debtor is discharged from his indebtedness, the agreement is not within the statute of frauds. But it is otherwise if the original debtor continues liable.

IRRELEVANT EVIDENCE SHOULD BE EXCLUDED. A compromise agreement signed by a part only of the creditors of a debtor, including the plaintiff in a subsequent action, and which was to be void unless signed by all, is inadmissible to affect a different agreement afterwards entered into between the plaintiff and the debtor.

GENERAL *assumpsit* for money had and received. Plaintiffs were partners under the name of E. A. Packer & Co. Filley & Co. were doing business in New Haven, and on May 18, 1859, were in failing circumstances, and unable to pay their debts in full. Plaintiffs were their creditors to the amount of \$1,975.37, and were the largest creditors in the city of New York. Benton had some coal to sell belonging to Filley & Co., and proposed to settle matters. So on June 1, 1859, in pursuance of a prior understanding, the plaintiffs, Filley & Co., and the defendant agreed orally that Filley & Co. should transfer and deliver all their partnership assets to the defendant; that the plaintiffs should lend money enough to the defendant to enable him to obtain a discharge from all the other creditors; and the defendant agreed to pay off all the debts against Filley & Co., other than the debt of the plaintiffs; to discharge Filley & Co. from all such debts; to take all their partnership assets and convert the same into money; to borrow of the plaintiffs money sufficient to enable him to pay off all the debts of Filley & Co. for what he could purchase them for; and then to repay to the plaintiffs the money thus to be loaned by them, together with seventy-five cents on a dollar of their debt, which the defendant agreed "to pay and guarantee" to the plaintiffs, as well as a further sum if realized. Filley & Co. did transfer and deliver to the defendant all their partnership assets; the plaintiffs lent the defendant \$1,477.80; and the defendant bought up and discharged all the other debts of Filley & Co., converted their assets into cash, and made sundry payments from the proceeds to the plaintiffs, but there was still left due to the plaintiffs the sum of \$569.73. Defendant denied the claim of plaintiffs. Defendant offered in evidence a compromise agreement, dated May 18, 1859, signed by a part only of the creditors of Filley & Co., including the plaintiffs, and which was to be void unless signed

by all. The basis of this compromise was fifty cents on the dollar; and the defendant asked the court to charge the jury that if the defendant ever promised the plaintiffs to pay them seventy-five cents on a dollar of their debts against Filley & Co., the same was a corrupt and fraudulent agreement as against other creditors of Filley & Co., who signed the agreement, and therefore void. The court, however, told the jury that they might leave the writing out of consideration. Verdict for the plaintiffs, and the defendant moved for a new trial for errors in the rulings and charge of the court. Other facts are stated in the opinion.

Watrous and Rogers, in support of the motion.

Bronson, contra.

By Court, BUTLER, J. It appears from the motion that the defendant upon the trial in the court below objected to the evidence offered by the plaintiffs to sustain the action, on the ground: 1. That there was no count in the plaintiff's declaration to justify such proof; 2. That the agreement sought to be proved, if made, was void, not being in writing; and 3. That no action at law could be maintained upon such an agreement, even if in writing. The evidence having been admitted, the court were requested to charge the jury to the same effect, and the court declined to charge as requested. In thus receiving the evidence objected to, and declining to charge, the defendant insists that the court erred. We think otherwise.

1. We think, in the first place, that by the contract as claimed by the plaintiffs, and which we must presume to have been found by the jury, the defendant became indebted to the plaintiffs, by an assumption of the debt of Filley & Co., to the extent of seventy-five cents on the dollar of that debt, and it is elementary law that where a sum certain is due on a simple contract, *indebitatus assumpsit* will lie to recover it. It is true that the language of the motion in respect to the assumption claimed is that "the defendant then and there agreed to pay and guarantee the debt to the plaintiffs"; but it is clear from the whole statement of the contract that it was intended to be an absolute contract to pay the debt, and that the word "guarantee," as used in that connection, is not to be understood in a technical sense. We see no objection, therefore, to the form of the action.

2. And we think, in the second place, that the evidence was

properly admitted, and the contract provable, although it rested in parol.

We have no disposition to relax the rules of construction applicable to the statute of frauds, or in any manner to weaken that statute. Our views on that subject are fully expressed by Judge Dutton, in *Clapp v. Lawton*, 31 Conn. 95; and if this case was, as claimed, analogous to that, we should come to the same conclusion in respect to it. But this case differs essentially from that. There a third party received the property of the debtor, and promised him generally to pay his debts. None of the creditors were parties to the arrangement, and the original indebtedness continued as before. Here the contract was tripartite between the debtor, a creditor, and a third person; and it contemplated the discharge of the original debtor, and a new obligation by the third party, to the particular creditor. Such new obligations and indebtedness is not within the statute of frauds.

In *Turner v. Hubbell*, 2 Day, 457 [2 Am. Dec. 115], the distinguished counsel for the defendant in error deduced from the cases which had then occurred under this branch of the statute the following definition of the promise intended by it, to wit: "An undertaking by a person, not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made is at the same time liable"; and it was adopted by the court. With a single modification, that definition furnishes as perfect a test as has ever been, or we think can be, devised. The modification required is this: In the case of *Williams v. Leper*, 3 Burr. 1866, the promise to pay the debt was made after the original debtor had been discharged by reason of a distress; and the counsel in *Turner v. Hubbell*, *supra*, seem to have assumed that a contract to pay the debt of another would be within the statute of frauds if the original debtor was liable at the time the promise was made. But it is now well settled that if the original debtor is discharged by the new contract, it is not within the statute: See the cases cited by Judge Dutton in his revision of *Swift's Digest*, page 248. The foregoing definition may be modified, therefore, so as to read: "An undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made, continues liable." Applying this test to the case in hand, it is obvious that the objection of the defendant ought not to prevail.

It was the purpose and effect of the tripartite contract in question to discharge the original debtors in consideration of their giving up their property to the defendant, as well as to operate the defendant, in consideration of that discharge, the assent of the plaintiff to the delivery of the property to the defendant, and of his agreement to loan the funds necessary to enable the defendant to purchase the debts and carry out his speculation. As the original debtors did not continue liable, an essential element of the test was wanting, and the contract was not within the statute.

3. And we also think that the court did right in excluding the paper offered from the consideration of the jury. It was of no importance in respect to the issue between the parties. It was confessedly an inoperative paper, and did not bind the plaintiffs, because not signed by all the creditors. Nor did it tend to prove any fact material to the issue between them. The agreement between them, whether intending to make the defendant a principal and substitute debtor, as the plaintiffs claimed, or whether it constituted the defendant the agent of the plaintiffs, as he claimed, was made without reference to the paper, and with knowledge that it was inoperative. Having no connection with the agreement as inducement, consideration, or subject-matter, it had no connection with or bearing upon the case. And being an inoperative paper, no fraud affecting the subsequent agreement between the parties could be predicated upon it. It was therefore properly withdrawn from the consideration of the jury, as tending to confuse and mislead them.

A new trial must be denied.

In this opinion the other judges concurred.

INDEBITATUS ASSUMPSIT WILL LIE ON ABSOLUTE CONTRACT FOR SUM CERTAIN: *Reeside's Ex'r v. Reeside*, 88 Am. Dec. 503; *Walker v. Brown*, 81 Id. 287; *Fuller v. Duren*, 76 Id. 318.

PROMISE TO PAY ANOTHER'S DEBT MUST BE IN WRITING WHEN: See *Farley v. Cleveland*, 15 Am. Dec. 387; note to *Nelson v. Boynton*, 37 Id. 153; *Warren v. Smith*, 76 Id. 115, note 117; extended note *infra*.

PROMISE TO PAY ANOTHER'S DEBT, WHEN NOT WITHIN STATUTE OF FRAUDS: See *Farley v. Cleveland*, 15 Am. Dec. 387; note to *Nelson v. Boynton*, 37 Id. 153; *Tindal v. Touchberry*, 49 Id. 637; note to *Fish v. Thomas*, 66 Id. 350; *Spooner v. Dunn*, 63 Id. 414; *Andre v. Bodman*, 71 Id. 628, note 635; extended note *infra*.

IRRELEVANT AND IMMATERIAL TESTIMONY SHOULD BE EXCLUDED: *Hovey v. Chase*, 83 Am. Dec. 514; but its introduction is not ground for setting aside

a verdict and granting a new trial, unless it has prejudiced the complaining party: *Winona etc. R. R. Co. v. Waldron*, 88 Id. 100; *Adams v. Blodgett*, 90 Id. 569.

THE PRINCIPAL CASE WAS RELIED UPON IN *Gridley v. Sumner*, 43 Conn. 16; *Pratt's Appeal*, 41 Id. 196. These cases were "undertakings by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking was made continued liable," and therefore within the statute of frauds: See *infra*.

WHAT CASES FALL WITHIN AND WHAT WITHOUT RULE REQUIRING PROMISES TO ANSWER FOR DEBT OF ANOTHER TO BE IN WRITING; AND SHOWING WHAT PROMISES, THOUGH TO PAY SOMETHING FOR ANOTHER PERSON, ARE NEVERTHELESS ORIGINAL PROMISES. — The question as to what oral promises are now within the statute of frauds has been complicated by a vast number of decisions which it is a hopeless task to reconcile. The question is not new. It is old and vexatious. The English authorities are hopelessly in conflict, and those of the American courts are in the same condition, and it can scarcely be said that any construction of this section of the statute of frauds is settled law. This is one of the most difficult questions known to the law, and has probably given birth to more nice and shadowy distinctions than any other legal question extant. Several attempts have been made by learned judges to classify the cases on this section of the statute of frauds, and to draw from them a rule that might be a guide to future decisions, but no classification yet made has put the question at rest. To know what has been done in attempting to reduce the cases to a system, see the opinion of Shaw, C. J., in *Nelson v. Boynton*, 3 Met. 396; S. C., 37 Am. Dec. 148; of Comstock, C. J., in *Mallory v. Gillett*, 21 N. Y. 412; of Sill, J., in *Kingsley v. Balcome*, 4 Barb. 131; of Gray, J., in *Furbish v. Goodnow*, 98 Mass. 297; of Poland, C. J., in *Fullam v. Adams*, 37 Vt. 391; of Kent, C. J., in *Leonard v. Vredenburg*, 8 Johns. 29; S. C., 5 Am. Dec. 317; of Savage, C. J., in *Farley v. Cleveland*, 4 Cow. 432; S. C., 15 Am. Dec. 387; and the essay of Judge Redfield upon the case of *Fullam v. Adams*, *supra*, published in 4 Am. Law Reg., N. S., 473-478.

CITATIONS OF CASES WITHIN AND WITHOUT STATUTE. — The following are some of the later cases held to be within the statute of frauds, many of which are not classified below: *Turner v. Hubbell*, 2 Day, 457; S. C., 2 Am. Dec. 115; *Leonard v. Vredenburg*, 8 Johns. 29; S. C., 5 Am. Dec. 317; *Nixon v. Vanhise*, 5 N. J. L. 491; S. C., 8 Am. Dec. 618; *Farley v. Cleveland*, 4 Cow. 432; S. C., 15 Am. Dec. 387, note 393; *Nelson v. Boynton*, 3 Met. 396; S. C., 37 Am. Rep. 148; *Allehouse v. Ramsay*, 6 Whart. 331; S. C., 37 Am. Dec. 417; *Doyle v. White*, 26 Me. 341; S. C., 45 Am. Dec. 110; *Carville v. Crane*, 5 Hill, 483; S. C., 40 Am. Dec. 364; *Durham v. Arledge*, 1 Strob. 5; S. C., 47 Am. Dec. 544; *Loonie v. Hogan*, 9 N. Y. 435; S. C., 61 Am. Dec. 683; *Wickersham v. Orr*, 9 Iowa, 253; S. C., 74 Am. Dec. 348; *Stewart v. Campbell*, 58 Me. 439; S. C., 4 Am. Rep. 296; *Ames v. Foster*, 106 Mass. 400; S. C., 8 Am. Rep. 343; *Hunter v. Randall*, 62 Me. 423; S. C., 16 Am. Rep. 490; *Belknap v. Bender*, 75 N. Y. 446; S. C., 31 Am. Rep. 476; collected cases digested in extended note to *Muller v. Riviere*, 46 Am. Rep. 300-302; *Beasten v. Hendrickson*, 44 Md. 609; S. C., 2 Law & Eq. Rep. 564; *Rose v. O'Linn*, 10 Neb. 364; S. C., 6 N. W. Rep. 430; *Bates v. Donnelly*, 57 Mich. 521; S. C., 24 N. W. Rep. 788; *Shoch v. McLane*, 29 Id. 76; *Morrissey v. Kinsey*, 16 Neb. 17; *Du-rant v. Allen*, 48 Vt. 58; *Vaughn v. Smith*, 65 Iowa, 579; *Studley v. Barsh*, 54 Mich. 6; *Townsend v. Long*, 77 Pa. St. 143; *Pratt's Appeal*, 41 Conn. 191;

Gridley v. Sumner, 43 Id. 14; *Frame v. August*, 88 Ill. 424; *Simpson v. Hall*, 47 Conn. 417; *Birchell v. Neaster*, 36 Ohio St. 331; *Estate of Hollowbush*, 13 Phila. 217; *Stratton v. Hill*, 134 Mass. 27.

The following are some of the later cases held not to be within the statute of frauds, many of which are not classified below: *Leonard v. Vredenburg*, 8 Johns. 29; S. C., 5 Am. Dec. 317, note 321-325; *Barker v. Bucklin*, 2 Denio, 45; S. C., 43 Am. Dec. 726; *Durham v. Arledge*, 1 Strob. 5; S. C., 47 Am. Dec. 544; note to *Wallace v. Wortham*, 57 Id. 198; *Haynes v. Nice*, 100 Mass. 327; S. C., 1 Am. Rep. 109; *Putnam v. Farnham*, 27 Wis. 187; S. C., 9 Am. Rep. 459; *Conradt v. Sullivan*, 45 Ind. 180; S. C., 15 Am. Rep. 261; *Townsend v. Long*, 77 Pa. St. 143; S. C., 18 Am. Rep. 438; *Bellows v. Sowles*, 57 Vt. 164; S. C., 52 Am. Rep. 118; collected cases digested in note to *Muller v. Riviere*, 46 Am. Rep. 296-300; *Kohn v. First Nat. Bank*, 15 Kan. 423; *Hale v. Stuart*, 76 Mo. 20; *Evans v. Mason*, 6 Rep. 732; *McKincke v. Falk*, 55 Wis. 427; S. C., 15 Rep. 95; *Poole v. Hintrager*, 60 Iowa, 180; S. C., 14 N. W. Rep. 223; *Clay v. Tyson*, 26 Id. 240, note 242; *Abbott v. Nash*, 29 Id. 65; *Daniel v. Robinson*, 33 Id. 497; *Lerch v. Gallup*, 67 Cal. 595; *Clay v. Tyson*, 19 Neb. 530; *Tecters v. Lamborn*, 43 Ohio St. 144; *Smart v. Smart*, 97 N. Y. 559; *Morgan v. Woodruff*, 12 Daly, 207; *Abel v. Wilder*, 9 Lea, 453; *Sutherland v. Carter*, 52 Mich. 151; *Bailey v. Bailey*, 56 Vt. 398; *Green v. Randall*, 51 Id. 67; *Estabrook v. Gebhart*, 32 Ohio St. 415; *Moore v. Stoval*, 2 Lea, 543; *Hoile v. Bailey*, 58 Wis. 434; *Merriman v. McManus*, 102 Pa. St. 102; *Cock v. Moore*, 18 Hun, 31; *Raymer v. Sim*, 2 Har. & McH. 451; S. C., 1 Am. Dec. 379; *De Walt v. Hartzell*, 7 Cal. 601.

COLLATERAL AND ORIGINAL UNDERTAKINGS.—One principle running through the cases is that a collateral undertaking to answer for the debt, etc., of another is within the statute, and that an original undertaking is not; but in many of the reported cases the question as to whether the oral agreement is within the statute is disposed of by saying that the promise is collateral or original, as the case may be, without stating the grounds upon which this conclusion is based; though the question in the case seems to be, what is a collateral and what an original contract. The best explanation of these terms is probably found in the decision rendered by Shaw, C. J., in *Nelson v. Boynton*, 3 Met. 396; S. C., 37 Am. Dec. 148; and by the same learned judge in *Stone v. Walker*, 13 Gray, 615. The words "collateral" or "original" promise do not occur in the statute of frauds; and have been introduced by courts to explain its objects, and expound its true interpretation: Id. If the promise is made by one in his own name to pay for goods or money delivered to, or services done for another, that is original; it is his own contract on good consideration, is called original, and is binding on him without writing. But if the language is, "Let him have money or goods, or do service for him, and I will see you paid," or "I promise you that he will pay," or "If he do not pay I will,"—this is collateral, and though made on good consideration, it is void by the statute": *Stone v. Walker*, 13 Gray, 615; *Baldwin v. Hiers*, 73 Ga. 739; *Clay v. Walton*, 9 Cal. 334; *D'Wolf v. Rabaud*, 1 Pet. 476; *Aldrich v. Jewell*, 12 Vt. 125; S. C., 36 Am. Dec. 330. "If A agree to advance B a sum of money for which B is to be answerable, but at the same time it is expressly upon the understanding that C will do some act for the security of A, and enter into an agreement with A for that purpose, it would scarcely seem a case of a mere collateral undertaking, but rather a trilateral contract. The contract of B to repay the money is not coincident with nor the same contract with C to do the act. Each is an original promise, though the one may be deemed subsidiary or secondary to the other.

The original consideration flows from A, not solely upon the promise of B or C, but upon the promise of both, *diverso intuitu*, and each becomes liable to A, not upon a joint but a several original undertaking. Each is a direct, original promise, founded upon the same consideration: *D'Wolf v. Rabaud*, 1 Pet. 500. So "if A says to B, Pay so much money to C and I will repay it to you, it is an original independent promise; and if the money is paid upon the faith of it, it has always been deemed an obligatory contract, even though it be by parol; because there is an original consideration moving between the immediate parties to the contract": *Townley v. Sumrall*, 2 Id. 282. An original undertaking is created, and no writing is necessary, where a creditor gives up a demand on a debtor in consideration of a promise by the defendant to pay the debt; but there must be an extinguishment of the first debt as a consideration for the new promise: *Andre v. Bodman*, 13 Md. 241; S. C., 71 Am. Dec. 628, note 635. A promise by a third person to assume and pay a sum due to a creditor in consideration of the discharge of the original debtor, accompanied or followed by such absolute discharge, is an original and not a collateral promise, founded on a sufficient consideration, and need not be in writing: *Whittemore v. Wentworth*, 76 Me. 20; see *infra*. So the substitution of one debtor for another is founded on an original undertaking, and not upon a collateral one; and performance may be enforced as between the new parties, no matter what equities may have existed between the primary parties: *Edenfield v. Canaday*, 60 Ga. 456, and cases there cited. A promise to pay the debt of another, or to clear his mortgage, as a part of the consideration of property purchased, is an original promise and need not be in writing: *Clopper v. Poland*, 12 Neb. 69; S. C., 10 N. W. Rep. 538; *Follansbee v. Johnson*, 28 Minn. 311; *Stariha v. Greenwood*, 28 Id. 521; S. C., 11 N. W. Rep. 76; *Green v. Randall*, 51 Vt. 67; *Morrison v. Hogue*, 49 Iowa, 574. In the absence of words or circumstances showing a contrary intent, the words "we will see the articles paid for," or equivalent words, import a collateral undertaking, and are within the statute: *Wagner v. Hallack*, 3 Col. 176. Where the consideration of a defendant's undertaking or promise is for money or property to be furnished to or received by a third person, if the transaction be such that the third person remains responsible to the person who furnishes him with such money or property, or from whom the consideration proceeds, such promise or undertaking is collateral, and under the statute of frauds will not bind the defendant unless it be in writing: *Radcliff v. Poundstone*, 23 W. Va. 731.

COLLATERAL PROMISES ARE WITHIN STATUTE OF FRAUDS, AND TO BE VALID, MUST BE IN WRITING: *Moody v. Wiley*, 13 Rep. 13; *Power v. Rankin*, 114 Ill. 52; *Thatcher v. Rockwell*, 4 Col. 375; *Cole v. Hutchinson*, 26 N. W. Rep. 319; *Townsend v. Long*, 77 Pa. St. 143; *Rose v. O'Linn*, 10 Neb. 364; S. C., 10 Rep. 534; *Radcliff v. Poundstone*, 23 W. Va. 724, a case brought by a creditor of the husband against the husband and wife to charge the estate of the wife with her husband's debt upon her promise to pay the same; *Hill v. Frost*, 59 Tex. 25; *Mead v. Watson*, 57 Vt. 426, a case of prospective guaranty; *Clay v. Walton*, 9 Cal. 329. Thus, if two persons go with each other to an attorney to engage his services in defense of one of them on a criminal prosecution, *prima facie* that one is alone primarily responsible, and the liability of the other is within the statute of frauds, unless there was an original express promise on his part to pay for the services: *Stone v. Walker*, 13 Gray, 613. A personal judgment cannot be rendered against the owner of a house for material furnished in its construction upon the credit of the contractor, although the owner may have subsequently promised to see them paid

for; such a promise is merely a collateral verbal one, and not enforceable: *Farnham v. Davis*, 9 Atl. Rep. 725; see *Clay v. Walton*, 9 Cal. 329. An oral agreement made with attorneys employed to prosecute suits by a village to pay the costs and expenses of such attorneys in case of their inability to collect them from the village, which at the time is under preliminary injunction enjoining it from paying for such prosecutions, is void, as being a collateral promise within the statute of frauds: *Hooker v. Russell*, 30 N. W. Rep. 358. Where the undertaking of a third party is to further secure the payment of a debt already created between the regular parties to a negotiable note, it is a collateral contract, within the statute of frauds, requiring a writing to prove it, and a consideration to support it: *Hayden v. Weldon*, 43 N. J. L. 128; S. C., 12 Rep. 305. For other illustrations of collateral promises, see *In re Tozer*, 46 Mich. 299; *Bailey v. Freeman*, 6 Am. Dec. 371; *Skinner v. Conant*, 21 Id. 554; *Anderson v. Davis*, 31 Id. 612, note 614; *Nelson v. Boynton*, 37 Id. 148, note 153; *Taylor v. Drake*, 53 Id. 680; *Moses v. Norton*, 58 Id. 738; note to *Beebe v. Dudley*, 59 Id. 345; *Dufolt v. Gorman*, 66 Id. 543; *Van Doren v. Tjader*, 90 Id. 498, 501; collected cases digested in note to *Muller v. Riviere*, 46 Am. Rep. 300-302, and other cases cited at the beginning of this note, as being within the statute. To make a promise of a party to pay the debt of another binding, it must be in writing: *Frame v. August*, 88 Ill. 424; *Ruppe v. Edwards*, 52 Mich. 411; S. C., 18 N. W. Rep. 193; *Ingersoll v. Baker*, 41 Mich. 48; *Bonine v. Denniston*, 41 Id. 292; *Clement's Appeal*, 52 Conn. 464; *Luce v. Zeile*, 53 Cal. 54; *Ackley v. Parmenter*, 31 Hun, 476; *Wagner v. Hallack*, 3 Col. 176; *Hill v. Frost*, 59 Tex. 25; *Eckman v. Brash*, 20 Fla. 763; *Dee v. Downs*, 57 Iowa, 589; S. C., 11 N. W. Rep. 2; *Richardson v. Robbins*, 124 Mass. 105; *Shaaber v. Bushong*, 17 Rep. 697; *Preston v. Young*, 46 Mich. 148; S. C., 41 Am. Rep. 148; *Barker v. Bucklin*, 43 Am. Dec. 726, note 739; *Taylor v. Drake*, 53 Id. 680; *Warren v. Smith*, 76 Id. 115; note to *Lookout Mountain R. R. Co. v. Houston*, 2 S. W. Rep. 37. Thus a promise to execute a note as surety for another: *Dee v. Downs*, 57 Iowa, 589; or a naked promise by the assignee of a note taken for collection to pay the debt of the assignor: *Frame v. August*, 88 Ill. 424; or a promise to pay a note out of money belonging to the maker which might be in the hands of the promisor at the maturity of the note, and if that fund was insufficient, that the firm of which the promisor was a member would pay the same: *Shaaber v. Bushong*, 105 Pa. St. 514; S. C., 17 Rep. 697; or a promise by an employer to pay the debt of an employee to a party to whom he is indebted, at the end of sixty days, if the employee worked so long under his contract, which bound him to work for a longer period, the creditor not releasing his claim against the employee, or giving him an extension of time for payment: *Willard v. Boshard*, 32 N. W. Rep. 538, — is within the statute of frauds, and must be in writing; for a parol contract to answer for the debt of another is void: *Luce v. Zeile*, 53 Cal. 54; *Ingersoll v. Baker*, 41 Mich. 48; *Bonine v. Denniston*, 41 Id. 292. And all promises to answer for the debt or default of a third person must be in writing, whether the promise be made before, at the time, or after the debt or liability is created: *Wagner v. Hallack*, 3 Col. 176; *Clay v. Walton*, 9 Cal. 334. The writing must also be signed by the party to be charged: *Eckman v. Brash*, 20 Fla. 763; *Ruppe v. Edwards*, 52 Mich. 411; S. C., 18 N. W. Rep. 193; or his duly authorized agent: See case last cited. And such promises must be founded upon a consideration passing from the promisee, or based upon a contract between the promisor and the original debtor: *Frame v. August*, 88 Ill. 424; *Hill v. Frost*, 59 Tex. 25; and the consideration must be expressed in the writing: *Barker v. Buck-*

in, 2 Denio, 45; S. C., 43 Am. Dec. 726; but see *infra*. A written undertaking to answer for the debt of another must show the terms of the contract, either in itself or by reference to something else, without a resort to parol evidence: *Eckman v. Brash*, 20 Fla. 763; *Hall v. Soule*, 11 Mich. 494.

ORIGINAL PROMISE TO PAY ANOTHER'S DEBT IS NOT WITHIN STATUTE OF FRAUDS, and if founded on a valuable consideration received by the promisor, is good and valid, though not in writing: *Power v. Rankin*, 114 Ill. 52; *Graham v. Mason*, 17 Ill. App. 399; *Stone v. Walker*, 13 Gray, 615; *Clay v. Walton*, 9 Cal. 334; *Thatcher v. Rockwell*, 4 Id. 375; *West v. O'Hara*, 55 Wis. 649; *D'Wolf v. Rabaud*, 1 Pet. 476; *Towneley v. Sumrall*, 2 Id. 170; *Emerson v. Slater*, 22 How. 28. Thus if, upon the close of a partnership, one partner takes to his own use a portion of the assets, whether choses in action or anything else, on an oral agreement to account to his copartners for a definite share, it is a separate and direct agreement, on a new consideration, and not within the statute: *Conger v. Cotton*, 37 Ark. 286. An oral promise to pay the debt of another out of his property, placed in the hands of the promisor for that purpose, is not within the statute: *Mason v. Wilson*, 81 N. C. 51; S. C., 37 Am. Rep. 612. An oral promise to pay the debt of a minor is not within the statute: *King v. Summitt*, 73 Ind. 312; S. C., 38 Am. Rep. 145; and an oral guaranty of the genuineness of a note and the liability of the maker to pay it, made by the holder upon a transfer of it for value, is valid: Id.; *Milks v. Rich*, 80 N. Y. 269; S. C., 36 Am. Rep. 615; *Eagle Moving etc. Co. v. Shattuck*, 53 Wis. 455; S. C., 40 Am. Rep. 780; *contra: Dows v. Swett*, 134 Mass. 140, holding it to be within the statute, even if the principal object of the transaction is the payment of the guarantor's own debt: See *infra*. So with an agreement by an administrator to submit a probate matter to arbitration: *Holderbaugh v. Turpin*, 75 Ind. 84; S. C., 39 Am. Rep. 124. A verbal promise or agreement to pay the debts contracted by a railroad company and its contractors in constructing a part of the road, in consideration of the cancellation of the original contract and the letting to the promisors of a new contract for the construction, is a new and original undertaking upon a valid consideration, passing at the time, and is not within the statute: *Lookout Mountain R. R. Co. v. Houston*, 2 S. W. Rep. 36, note 37. So where contractors to build a railroad agreed with merchants to pay orders and time-checks issued by a subcontractor to his employees, and upon the faith of this agreement, and giving credit exclusively to the contractors, the merchants accepted and received such orders and time-checks in exchange for goods, it was held that the promise of the contractors was not within the statute: *West v. O'Hara*, 55 Wis. 645; S. C., 13 N. W. Rep. 894.

So where a firm of lumbermen, who had made a logging contract, wrote to the jobber with whom it was made that he might say to his men, and show them a letter containing the statement, "that we here agree to pay every man in your employ to the last dollar that may be due him, that stays by you until you put in your logs,"— it was held that this was a promise made directly to the employees; that the firm made the jobber their agent to bring it to their notice; that any of the workmen who accepted its terms by sawing, unless sooner discharged, until the logs were put in, could maintain an action upon it against the firm for so much of their wages as had fallen due before the date of the letter as well as for what fell due afterwards; and that after its date the jobber could increase the pay of the workmen, and represented the firm for that purpose: *Tooke v. Comstock*, 45 Mich. 603; S. C., 8 N. W. Rep. 564. Where, after three visits made by a physician to a son-in-law of the

defendant, the latter undertook to be responsible for the payment for the services of the former, and services were subsequently rendered under this promise, it was held that the defendant's promise was an original undertaking as to the subsequent visits, and that he was liable for the reasonable value of such services, but not for services rendered before his undertaking: *King v. Edmiston*, 88 Ill. 257. So where plaintiff, as purchaser of real estate, executed to his grantor a purchase-money mortgage, and defendant held a prior mortgage upon the same premises executed by the grantor, there being also another mortgage held by another person on the same land, but junior to defendant's mortgage, and the defendant requested the plaintiff to pay the amount due on the purchase-money mortgage to the defendant, so as to have it applied on defendant's mortgage, and promised to obtain a release of the premises from the mortgage junior to defendant's mortgage, which was held by an outside party, — it was held that the agreement was not within the statute of frauds, it being an original, and not a collateral, undertaking: *McCraith v. National etc. Bank*, 10 N. E. Rep. 862, affirming 37 Hun, 641. A let B take a yoke of oxen to use in clearing land for A's wife, and with the understanding that B should own the oxen when he had done one hundred dollars' worth of clearing: held, that this arrangement was not void under the statute: *Sutherland v. Carter*, 52 Mich. 151; S. C., 17 N. W. Rep. 780. The satisfaction of the indebtedness of a third person to the payee is a sufficient consideration for a promissory note. The contract evidenced by such note is original, and not collateral, and therefore not within the statute of frauds: *Holm v. Sandberg*, 21 N. W. Rep. 416. Upon the facts appearing in *Grant v. Wolf*, 24 Id. 289, the promise of the defendants to plaintiffs, "to see them paid" for boarding hands in the employ of defendants' subcontractors, was held to be original, and not within the statute. If A agrees with B that if B will become the surety of C on a note to D, A will see the note paid, and indemnify B, and B becomes surety, relying solely upon the promise of A, the agreement is not within the statute: *Demerit v. Bickford*, 58 N. H. 523. In this case, the court said: "The reasoning of the courts, which hold that the promise is not within the statute, is not always the same. The more common is, that the promise must be made to the creditor to be within the statute; that a promise to the debtor to pay his debt to the creditor, or to a surety, to indemnify him for becoming surety for a third person to a fourth, is an original and not a collateral undertaking, when the promisee acts solely on the promise of the promisor"; and cited a multitude of cases to show the conflict of authority upon this point: See note to *Muller v. Riviere*, 46 Am. Rep. 298, where they are given. When a creditor accepts from a third person, in payment and satisfaction of his debt, the written note or obligation of such third person, the new contract is an original undertaking, and is not within the statute; and being supported by a sufficient consideration, as against the person signing it as principal, it is also supported by a sufficient consideration as against another person who, at the same time, signs it as surety: *Carlisle v. Campbell*, 76 Ala. 247. An agreement by the purchaser of real estate to pay a note of the grantor, in consideration of the release of an attachment by a surety on the note, is not within the statute: *Morrison v. Hogue*, 49 Iowa, 574. A settlement of suits involving the title to lands claimed by the wife affords a good consideration for the husband's promise to pay a stated sum to the adverse party. Such promise is an original one, and not one to pay the debt of his wife, and need not be in writing: *Shafer v. Ryan*, 84 Ind. 140. Evidence to prove a promise to pay the debt of another as a new and original undertaking, and not a contract of suretyship, must be clear

and satisfactory; otherwise it will fall within the statute of frauds: *Haverly v. Mercur*, 78 Pa. St. 257. For other illustrations as to original undertakings, not collateral undertakings to pay another's debt, and not within the statute of frauds, see *Prime v. Koehler*, 7 Daly, 345; *Kessler v. Sonneborn*, 10 Id. 383; *Kelley v. Schupp*, 60 Wis. 76; *Treat Lumber Co. v. Warner*, 60 Id. 183; *Bailey v. Bailey*, 56 Vt. 396; *Quintard v. De Wolf*, 1 Am. Law Reg., N. S., 181; *White v. Rintoul*, 17 Jones & S. 421; *Barrett v. McHugh*, 128 Mass. 165; *Harrison v. Saxtel*, 6 Am. Dec. 337; *Underhill v. Gibbon*, 9 Id. 82; *Rogers v. Collier*, 23 Id. 153; *Anderson v. Davis*, 31 Id. 612; note to *Jones v. Hardesty*, 32 Id. 191; note to *Nelson v. Boynton*, 37 Id. 153; *Proprietors of Upper Locks v. Abbott*, 40 Id. 184; *Spann v. Balmell*, 46 Id. 346; note to *Wallace v. Wortham*, 57 Id. 197, note 198; note to *Bebee v. Dudley*, 59 Id. 345; *Spooner v. Dunn*, 63 Id. 414; *Andre v. Bodman*, 71 Id. 628; collected cases digested in note to *Muller v. Biviere*, 46 Am. Rep. 296-300, and other cases cited at the beginning of this note, as not being within the statute. Instead of holding a promise to be original, and not within the statute of frauds, some of the cases merely say that it is not a promise to answer for the debt of another within the meaning of that statute. But we apprehend that it makes little difference which mode of expression is adopted. Each class of cases is without the statute, and the promise, as opposed to a collateral one, is in the nature of an original promise. This may be illustrated by the following cases: *Whitbeck v. Whitbeck*, 18 Am. Dec. 503; *Fish v. Thomas*, 66 Id. 348, note 350; *Quintard v. De Wolf*, 1 Am. Law Reg., N. S., 181; *Walker v. Hill*, 119 Mass. 249; S. C., 1 Law & Eq. Rep. 125; *Thornton v. Williams*, 71 Ala. 555; *Elson v. Spraker*, 100 Ind. 374; *Budd v. Thurber*, 61 How. Pr. 206; *Lehman v. Levy*, 69 Ala. 48; *Vaughn v. Smith*, 58 Iowa, 553; *Palmer v. Witcherly*, 15 Neb. 98; *Davis v. Tift*, 70 Ga. 52; *Locke v. Humphries*, 60 Ala. 117.

Thus it is not a promise to answer for the debt of another, within the meaning of the statute of frauds, where one of two sureties on a bond binds himself to hold his co-surety harmless from any liability or loss on account of the bond: *Hoggatt v. Thomas*, 35 La. Ann. 296; where a stockholder and president of a corporation orally promised M. that if he would subscribe and pay five hundred dollars to the capital stock, he should receive fifteen per cent on that amount in a year: *Moorehouse v. Crangle*, 36 Ohio St. 564; S. C., 38 Am. Rep. 564; where, on the assignment of a lease, the assignee orally agreed to assume the covenants, and pay the rents: *Wolke v. Fleming*, 103 Ind. 105; S. C., 53 Am. Rep. 495; where the owner of a vessel, subject to a lien for a debt incurred by a former owner, agreed to pay the lien, on the holder of the lien forbearing to enforce the same: *Fears v. Story*, 131 Mass. 47; where goods are directed to be delivered to a builder by the owner of the building, who directed the seller to charge them to him, he promising to pay for them: *Walker v. Hill*, 119 Mass. 249; S. C., 1 Law & Eq. Rep. 125; where a promise is based upon a new and original consideration of benefit or harm moving between the party to whom the debt is due and the party agreeing to pay the same: *Whitehart v. Hyman*, 90 N. C. 487; where the promise is to the debtor instead of the creditor to pay a debt which the debtor owes to a third person: *Ware v. Allen*, 1 S. Rep. 738, note; where a person agrees to satisfy his obligation to an estate by distributing the sum he holds amongst its creditors, taking their receipts: *Decuir v. Ferrier*, 1 McGlain, 205; where, after the bankruptcy of a firm and its members, a new promise is made by one of the partners to pay a note of the firm given before bankruptcy, as it is based on a good consideration: *Weatherly v. Hardman*, 68 Ga. 592; where one firm receives the assets of another, agreeing to pay the amount of the

purchase-money, not into the hands of the vendors, but into the hands of their various creditors, according to the amount owing to each: *Wynn's Adm'r v. Wood*, 97 Pa. St. 216; where a parol promise is made to pay the debt of another out of funds transferred to the promisor: *Justice v. Tallman*, 86 Id. 147; though made with the assent of said third person: *Dock v. Boyd*, 9 Rep. 421; where a wife pledges her trunk to pay the railroad fare of a child traveling under her charge, and the husband agrees to pay the fare if the trunk is forwarded: *Coquard v. Union Depot Co.*, 10 Mo. App. 261; where the holder of a third person's contract transfers the same to another person upon a consideration moving to himself, and makes a guaranty thereof simultaneously with the transfer, and as a part of the transaction: *Wilson v. Hentges*, 29 Minn. 102; where A applied to B to board his laborers engaged in getting cross-ties for a railroad; B objected because the pay would be doubtful; A replied that he would see the board paid; and B then agreed to board them, saying that she would look to A for the pay, and not to them, to which he assented: *Brown v. Harrell*, 40 Ark. 429; where a verbal promise was made by one person to the creditor of an execution on a judgment against a third person, that if such creditor would satisfy such execution such promisor would deliver certain personal property, and pay a certain sum of money to such creditor: *Palmer v. Blain*, 55 Ind. 11; or where the mother of A being sick, and becoming dissatisfied with her physician upon his second visit, A instructed the physician to pay no attention to the complaints of his mother, but to continue his treatment, and he would pay him for his services, whereupon the physician continued to treat her: *De Witt v. Root*, 18 Neb. 567; S. C., 26 N. W. Rep. 360.

1. *Promise to Pay One's Own Debt, or Made for his Own Benefit, is not within Statute.*—So with *Promise to Debtor instead of Creditor.*—A promise is not within the statute of frauds as being one to answer for the debt or default of another, if the debt can be considered the promisor's own: See numerous cases cited in note to *Fish v. Thomas*, 66 Am. Dec. 350; *Garner v. Hudgins*, 46 Mo. 399; S. C., 2 Am. Rep. 520; *Beardslee v. Morgner*, 4 Mo. App. 139; *Hoile v. Bailey*, 58 Wis. 434; S. C., 17 N. W. Rep. 322; as where a debtor induces his creditor to take in settlement of the indebtedness the note of a third person, with such debtor's guaranty of its payment, not stating the consideration: *Eagle Mowing etc. Co. v. Shattuck*, 53 Wis. 455; S. C., 10 N. W. Rep. 690; *Milks v. Rich*, 80 N. Y. 269; S. C., 36 Am. Dec. 615. And where the leading object of the promisor is not to become surety or guarantor of another, but to promote or subserve some interest of his own, his promise is not within the statute; and if founded upon a sufficient consideration, is valid, though not in writing, and though the effect of the promise be to incidentally guarantee the debt of a third person, or to pay the debt or discharge the obligation of another: *Fitzgerald v. Morrissey*, 14 Neb. 198; S. C., 15 N. W. Rep. 233; *Graham v. Mason*, 17 Ill. 399; *Darst v. Bates*, 95 Ill. 493; *Kelley v. Schupp*, 60 Wis. 76; S. C., 18 N. W. Rep. 725; *Young v. French*, 35 Id. 116; *Clay v. Walton*, 9 Cal. 329; *Williamson v. Hill*, 3 Mack (D. C.), 100; *Emerson v. Slater*, 22 How. 43; *Prime v. Koehler*, 77 N. Y. 91; *Spann v. Cochran*, 63 Tex. 240; *Walther v. Merrell*, 6 Mo. App. 370; note to *Lookout Mountain R. Co. v. Houston*, 2 S. W. Rep. 37, and numerous recent cases there cited; extended note to *Hake v. Solomon*, 28 N. W. Rep. 910; cases cited in note to *Clay v. Tyson*, 26 Id. 242; *Ames v. Foster*, 106 Am. Rep. 345; note to *Farley v. Cleveland*, 15 Am. Dec. 393; note to *Jones v. Hardesty*, 32 Id. 190; extended note to *Barker v. Bucklin*, 43 Id. 739; *Tindal v. Touchberry*, 49 Id. 637; note to *Wallace v. Wortham*, 57 Id. 197. Thus the promise to answer

for another's debt is not within the statute where it secures or confirms the promisor in the possession of his own property, or relieves it from a lien: *Prime v. Koehler*, 77 N. Y. 91; *Weisel v. Spence*, 59 Wis. 301; S. C., 17 Rep. 639. The statute will not exempt from liability one who has received a part of the consideration of a note, though he was not a signer thereof: *Dee v. Downs*, 50 Iowa, 310. So where a vendee of land agrees to pay a part of the purchase-money to a creditor of the vendor, the promise is not within the statute, notwithstanding the fact that in paying his own debt he extinguishes that of another, and that the liability of that other continues the same after as before his undertaking: *Lee v. Newman*, 55 Miss. 365. The mere fact, however, that advantage may incidentally result to the promisor from his oral promise to pay the debt of another is not sufficient to take it out of the statute, but it must be shown by other evidence that such advantage was the object or consideration of the promise: *Clapp v. Webb*, 52 Wis. 638; S. C., 9 N. W. Rep. 796; note to *Lookout Mountain R. R. Co. v. Houston*, 2 S. W. Rep. 37; note to *Clay v. Tyson*, 26 N. W. Rep. 242. On the other hand, where the main object of the promise is a benefit accruing directly to the promisor, and which he did not before enjoy, and the promise to pay the debt of another is a mere incident, then the accidental or incidental fact that the promise includes the answering for the debt of another will not bring it within the statute: *Walther v. Merrell*, 6 Mo. App. 370; *Williamson v. Hill*, 3 Mack (D. C.), 100. And where the object of a promisor in answering for another's debt is to benefit himself, it makes no difference that the object sought in making the promise does not turn out to be a benefit to the promisor; it is sufficient that the promisee submits to a sacrifice in behalf of the interest of the promisor, and not for the benefit of the original debtor: *Williamson v. Hill*, *supra*. A promise to answer for another's debt is not within the statute if the promise is made to the debtor. The statute applies only to promises made to the person to whom another is already indebted, or is to become responsible: *Williams v. Rogers*, 14 Bush, 776; S. C., 8 Rep. 305; *Pratt v. Bates*, 40 Mich. 37; S. C., 7 Rep. 501; *Green v. Estes*, 82 Mo. 337; *Demeritt v. Bickford*, 58 N. H. 523, and numerous cases there cited; *Davis v. Wiley*, 13 Rep. 734; *Baker v. Ingersoll*, 39 Mich. 158; *Windell v. Hudson*, 102 Ind. 521; note to *Ware v. Allen*, 1 S. Rep. 758, and late cases cited in note thereto; *Liddle v. Needham*, 39 Mich. 147; S. C., 33 Am. Rep. 359; *Jones v. Hardesty*, 32 Am. Dec. 180; numerous cases cited in note to *Barker v. Bucklin*, 43 Id. 739.

MIXED CASES—SOME WITHIN AND SOME WITHOUT STATUTE—CONFLICT OF AUTHORITY.—Contracts of indemnity are generally held not to be within the statute of frauds: *Garner v. Hudgins*, 46 Mo. 399; S. C., 2 Am. Rep. 620; *Marcy v. Crawford*, 16 Conn. 549; S. C., 41 Am. Dec. 158. Thus a contract between sureties to the same instrument, whereby one surety undertakes to indemnify another: *Horn v. Bray*, 51 Ind. 555; S. C., 19 Am. Rep. 742; *Hoggatt v. Thomas*, 35 La. Ann. 298; and a promise to indemnify another for signing a note as maker: *Beaman v. Russell*, 20 Vt. 205; S. C., 49 Am. Dec. 775, — have been held not to be within the statute. An oral promise to indemnify another for becoming surety for a third person was held to be within the statute in the following cases: *May v. Williams*, 61 Miss. 125; S. C., 48 Am. Rep. 80; *Nugent v. Wolfe*, 111 Pa. St. 471; S. C., 56 Am. Rep. 291; *Ferrell v. Maxwell*, 28 Ohio St. 383; S. C., 22 Am. Rep. 393; *Bissig v. Britton*, 59 Mo. 204; S. C., 21 Am. Rep. 379; *Brand v. Whelan*, 18 Ill. App. 186; *Dow v. Swett*, 134 Mass. 140; S. C., 45 Am. Rep. 310; but such a promise was held to be without the statute in the following cases:

Anderson v. Spence, 72 Ind. 162; S. C., 37 Am. Rep. 162; *Hassinger v. Newman*, 83 Ind. 124; S. C., 43 Am. Rep. 64; *King v. Summitt*, 73 Ind. 312; S. C., 38 Am. Rep. 145; *Milks v. Rich*, 80 N. Y. 289; S. C., 36 Am. Rep. 615; *Fogel v. Melms*, 31 Wis. 306; S. C., 11 Am. Rep. 608. When the promise of indemnity is an original undertaking, it is not within the statute; but if it is a collateral one, it is: See note to *Tarr v. Northey*, 35 Am. Dec. 234; *Beaman v. Russell*, 20 Vt. 205; S. C., 49 Am. Dec. 775; *Brand v. Whelan*, 18 Ill. App. 190; *Horn v. Bray*, 19 Am. Rep. 742, 744, and numerous cases there cited; *Demeritt v. Bickford*, 58 N. H. 523. A promise to pay for services to be done for another is an original undertaking, and not within the statute of frauds: *Ayer v. Hay*, 12 Am. Dec. 681; *King v. Edmiston*, 88 Ill. 257; note to *Lookout Mountain R. R. Co. v. Houston*, 2 S. W. Rep. 37, and cases there cited; *Maurin v. Fogelberg*, 32 N. W. Rep. 858, and cases there cited; if the credit was given to the promisor, and not to the person for whom the work was to be done: *Weisel v. Spence*, 59 Wis. 301. An undertaking to pay for goods to be delivered to another is an original one, not within the statute, and is binding, though not in writing, and though the charge therefor be made to such other person: See collected cases of the Reporter series in the note to *Lookout Mountain R. R. Co. v. Houston*, 2 S. W. Rep. 37; *Morrison v. Baker*, 81 N. C. 76; *Larson v. Jensen*, 53 Mich. 427; *Morris v. Osterhout*, 55 Id. 262; *Winslow v. Dakota Lumber Co.*, 32 Minn. 237; *McTyghe v. Herman*, 42 Ark. 285; *Hartley v. Varner*, 88 Ill. 561; *Baldwin v. Hiers*, 73 Ga. 739; *Lance v. Pearce*, 101 Ind. 595; *Sonstiby v. Keeley*, 7 Fed. Rep. 449; note to *Maurin v. Fogelberg*, 32 N. W. Rep. 858, with collected cases; *Leonard v. Vredenburg*, 5 Am. Dec. 317; *Rhodes v. Lee*, 24 Id. 744; *Wallace v. Wortham*, 57 Id. 197, note. Thus one who, to aid a dealer in purchasing goods on credit agrees with the seller that he may charge them to himself and the dealer jointly, is liable on an original undertaking: *Boyce v. Murphy*, 91 Ind. 1; S. C., 46 Am. Rep. 567. And an agreement by a partner that goods purchased of the firm may be applied in payment of the individual debt of his co-partner to the purchaser is not within the statute: *Rhodes v. McKean*, 55 Iowa, 547; S. C., 8 N. W. Rep. 359. The mere fact that the seller of goods, at the buyer's request, charges them to a third person, does not make the buyer's promise a collateral one within the statute of frauds: *Lance v. Pearce*, 101 Ind. 595; but see *Langdon v. Richardson*, 58 Iowa, 610; S. C., 12 N. W. Rep. 622. It is a question of intention whether charging goods to a person receiving them proves that trust or "credit" was given to him: See cases last cited; *Sanford v. Howard*, 68 Am. Dec. 101; *Winslow v. Dakota Lumber Co.*, 32 Minn. 237. But if the person for whose use goods are furnished be at all liable, any promise by a third person to pay therefore must be in writing, as it is within the statute of frauds: *Wallace v. Wortham*, 57 Am. Dec. 197; *Leland v. Creyon*, 10 Id. 654. And if any trust or "credit," as it is termed, is given to the person to whom goods are delivered, instead of the one who promises to see them paid for, the promise of another to pay for them is collateral, and within the statute of frauds: *Bugbee v. Kendrick*, 130 Mass. 437; *Wills v. Ross*, 77 Ind. 1; *Cole v. Hutchinson*, 26 N. W. Rep. 319; *Langdon v. Richardson*, 58 Iowa, 610; S. C., 12 N. W. Rep. 622; collected cases in note to *Lookout Mountain R. R. Co. v. Houston*, 2 S. W. Rep. 37. The rules applicable to promises made before trust or "credit" is given to pay for goods delivered to another may be summed up thus: Was trust, or "credit," as the books use it, given to the one to whom the goods were delivered? If so, then the one who promised to pay for them is a guarantor only, undertaking to pay another's debt. If no trust or "credit" was given

to the person receiving the goods, then the promisor is himself debtor for goods sold to him, and delivered to another person by his order. If the whole trust or "credit" be not given to the person who comes in to answer for another, his undertaking is collateral, and must be in writing: *Cahill v. Bigelow*, 18 Pick. 371; *Cole v. Hutchinson*, 26 N. W. Rep. 320, and cases there cited.

A parol promise to pay for goods previously sold to another is void: *McTighe v. Herman*, 42 Ark. 235. For a case constituting an exception to the general rule as to paying for goods to be delivered to another, see *Matthews v. Milton*, 26 Am. Dec. 247. Where a party, who was not before liable, undertakes to pay a debt of a third person, and as part of the agreement the original debtor is discharged from his indebtedness, the agreement is not within the statute of frauds. It does not come within the statute unless such third person in some way remains liable: *Mulcrone v. American Lumber Co.*, 55 Mich. 622; S. C., 22 N. W. Rep. 67; *Williamson v. Hill*, 3 Mack (D. C.), 100; *Whitemore v. Wentworth*, 76 Me. 20; *Walther v. Merrell*, 6 Mo. App. 370; *Thornton v. Quice*, 73 Ala. 321; *Howell v. Field*, 70 Ga. 592; *Sapp v. Faircloth*, 76 Id. 690; *Struble v. Hake*, 14 Ill. App. 546; *Lookout Mountain R. R. Co. v. Houston*, 2 S. W. Rep. 36, and note 37; *Corbett v. Cochran*, 30 Am. Dec. 348; note to *Anderson v. Davis*, 31 Id. 614; note to *Barker v. Bucklin*, 43 Id. 739; *Spann v. Baltzell*, 46 Id. 346; note to *Wallace v. Wortham*, 57 Id. 197; *Andre v. Bodman*, 71 Id. 628; *Warren v. Smith*, 76 Id. 115. Contracts of novation or substitution of debtors are not within the statute: *Hendricks v. Robinson*, 56 Miss. 694; *Howell v. Field*, 70 Ga. 592; *Sapp v. Faircloth*, 70 Id. 690. An oral acceptance of an order to pay money is invalid where the acceptor has no funds of the drawer in his hands at the time of the acceptance. Such a contract is within the statute, and must be in writing: *Walton v. Mandeville*, 56 Iowa, 597; S. C., 41 Am. Rep. 123; *Chapline v. Atkinson*, 45 Ark. 67; S. C., 55 Am. Rep. 531; *contra: Louisville etc. R'y Co. v. Caldwell*, 98 Ind. 245; *Fisher v. Beckwith*, 46 Am. Dec. 174. But a parol promise to pay the debt of another out of funds transferred to the promisor is not within the statute: *Justice v. Tallman*, 86 Pa. St. 147. Where the promisee surrenders an existing security on consideration of one's promise to pay another's debt, the promise is not within the statute, and is void without a writing. It then becomes an original, independent contract: *Matheis v. Carter*, 7 Ill. App. 225; *Borchsenius v. Canutson*, 103 Ill. 82; *Power v. Rankin*, 114 Id. 52. And it seems, when the promise is to apply the funds or property of the debtor in the hands of the promisor, that it is not necessary that the creditor should give up his recourse against the debtor upon the original claim. The promise is not a collateral but an original one, founded on a sufficient consideration: *Dock v. Boyd*, 92 Pa. St. 92. But a promise by a party to pay a debt due from another, made to a creditor who neither gives up his claim against the original debtor nor any lien upon his property that he may have, must be in writing to satisfy the statute of frauds: *Vaughn v. Smith*, 22 N. W. Rep. 684; *Weisel v. Spence*, 59 Wis. 301; S. C., 18 N. W. Rep. 165. The assumption of a debt, as part of the consideration to be paid under a contract between the person assuming the same and the original debtor, is not a promise to pay the debt of another within the statute of frauds: See collected cases in notes to *Lookout Mountain R. R. Co. v. Houston*, 2 S. W. Rep. 37; *Ware v. Allen*, 1 S. Rep. 738. The statute of frauds has no application to executed promises: *Putnam v. Swinney*, 63 Iowa, 383; *Madden v. Floyd*, 69 Ala. 221.

CONSIDERATION. — A parol promise to pay the debt of another is not within

the statute of frauds when it arises from some new and original consideration of benefit or harm moving between the newly contracting parties, for it then becomes an original contract: *Chapline v. Atkinson*, 45 Ark. 67; S. C., 55 Am. Rep. 531; *Power v. Rankin*, 114 Ill. 52; *Leonard v. Vredenburg*, 5 Am. Dec. 317, and extended note thereto 321-325; note to *Anderson v. Davis*, 31 Id. 614; numerous cases cited in the note to *Nelson v. Boynton*, 37 Id. 153; *Tindal v. Touchberry*, 49 Id. 637; *Farley v. Cleveland*, 15 Id. 387; *Dearborn v. Parks*, 17 Id. 206; *Warren v. Smith*, 76 Id. 115; *Cooper v. Chambers*, 25 Id. 710; *Stewart v. Campbell*, 4 Am. Rep. 303; *Putnam v. Farnham*, 9 Id. 460; *Carlisle v. Campbell*, 76 Ala. 247; *Wilson v. Hentges*, 29 Minn. 102; *Doyle v. White*, 45 Am. Dec. 110; *Whitehurst v. Hyman*, 90 N. C. 487; *Clapp v. Webb*, 52 Wis. 641. These cases show that the consideration may move from the promisee or from the original debtor. And the consideration of a promise need not be a benefit to the promisor necessarily; but it may consist in a benefit to a third person, or a detriment to the promisee; and one in whose favor a promise is made may sustain an action thereon against the promisor, although he is a stranger to the consideration: *Shaffer v. Ryan*, 84 Ind. 140; numerous cases cited in note to *Barker v. Bucklin*, 43 Am. Dec. 739; note to *Farley v. Cleveland*, 15 Id. 393; *Putnam v. Farnham*, 9 Am. Rep. 460; *Dearborn v. Parks*, 17 Am. Dec. 206; *Beardslee v. Morgner*, 4 Mo. App. 139. A promise not within the statute of frauds, whether verbal or written, when based upon a valuable consideration, will support an action: *Underwood v. Lovelace*, 61 Ala. 155; *Lerch v. Gallup*, 67 Cal. 595; *Fleming v. Easter*, 60 Ind. 399. And an oral promise within the statute, made upon no consideration, would be doubly invalid, because not in writing and for want of consideration: *Durant v. Allen*, 48 Vt. 58; *Boyce v. Owens*, 13 Am. Dec. 711; *Ackley v. Parmenter*, 50 Am. Rep. 693; *Hendricks v. Robinson*, 56 Miss. 695. As to cases within the statute, a promise to pay the debt of another will not support an action unless founded on a precedent liability or a new consideration: *Underwood v. Lovelace*, 61 Ala. 155; *Frame v. August*, 88 Ill. 424; *Power v. Rankin*, 114 Id. 52. A contract required by the statute of frauds to be in writing is valid if founded upon a sufficient consideration passing from the promisee, or if based upon a contract between the promisor and the original debtor: *Frame v. August*, 88 Id. 424; *Dahlman v. Hammel*, 45 Wis. 466. Where the main object of a promise is to obtain the release of the person or property of the debtor or other forbearance or other benefit to him, then the promise is within the statute, though a new consideration moves directly to the promisor: *Walther v. Merrell*, 6 Mo. App. 370. An agreement to pay the debt of another, in consideration that the creditor would forbear and give further time for payment, is founded on a good consideration, although no definite time of forbearance is named: *Calkins v. Chandler*, 36 Mich. 320; S. C., 24 Am. Rep. 593; *Sanders v. Barlow*, 21 Fed. Rep. 836. In *Townsend v. Long*, 77 Pa. St. 143, it is held that the consideration for a promise to pay another's debt, either absolutely or conditionally, is important only where it is a transfer of the creditor's claim to the promisor, making the transaction a purchase, or where it is a transfer of a fund pledged, set apart as held for the payment of the debt. The true question is not what is the consideration, but what is the promise: See *Furbish v. Goodnow*, 98 Mass. 300; Redfield's note to *Fuller v. Adams*, 4 Am. Law Reg., N. S., 476. Forbearance or extension of credit on a previous indebtedness constitutes a valid consideration to answer for the debt of another: *Dahlman v. Hammel*, 45 Wis. 466. As to the statement of the consideration in a written promise to answer for another's debt the cases are not uniform. In *Ecker v. Bohn*, 45 Md. 278, it

is held that the writing must state the consideration; and by statute the written promise is sometimes made invalid unless it states the consideration: *Parry v. Spikes*, 49 Wis. 384; S. C., 35 Am. Rep. 782; 5 N. W. Rep. 512; *Foster v. Napier*, 74 Ala. 393. But in *Sanders v. Barlow*, 21 Fed. Rep. 836, and *King v. Upton*, 4 Greenl. 387, S. C., 16 Am. Dec. 266, a written promise to pay another's debt is held valid though no consideration be expressed. However, the words "for value received" have been held a sufficient statement of the consideration: *Dahlman v. Hammel*, 45 Wis. 466; *Osborne v. Baker*, 34 Minn. 307; S. C., 57 Am. Rep. 55. As to what is a sufficient consideration, and statement of it, in a promise to pay another's debt, see *Leonard v. Vredenburg*, 5 Am. Dec. 317, extended note thereto 321-325; *Hughes v. Creyon*, 12 Id. 663; *Farley v. Cleveland*, 15 Id. 387; *Barnstine v. Eggart*, 15 Id. 625; *King v. Upton*, 16 Id. 266; *Dearborn v. Parks*, 17 Id. 206; *Corbett v. Cochran*, 30 Id. 348; note to *Smith v. Weed*, 32 Id. 526. As to expression of consideration, see particularly note to *Union Bank v. Coster*, 53 Id. 288; *Van Doren v. Tjader*, 90 Id. 498, 501.

STATE v. CURTIS.

[35 CONNECTICUT, 874.]

INFORMATION IN NATURE OF QUO WARRANTO ORIGINALLY ISSUED ONLY AT INSTANCE OF SOVEREIGN against any person who usurped any franchise or liberty against the king, or for misuser or non-user of franchises or privileges granted by him.

STATUTE OF 9 ANNE EXTENDED INFORMATION IN NATURE OF QUO WARRANTO so that it could issue at the relation of any person against any other person usurping, intruding into, or unlawfully holding any franchise or office in any corporation.

IN ENGLAND INFORMATION IN NATURE OF QUO WARRANTO LIES IN NAME OF SOVEREIGN against those who usurp sovereign franchises, because such usurpation is in derogation of the rights of the crown.

IN UNITED STATES INFORMATION IN NATURE OF QUO WARRANTO LIES IN NAME OF GOVERNMENT against those who usurp sovereign franchises, because such franchises are grantable or granted by the commonwealth.

POWER TO CREATE CORPORATION IS ATTRIBUTE OF SOVEREIGNTY.

CORPORATION CREATED BY GOVERNMENT OF UNITED STATES IS CREATURE OF FEDERAL SOVEREIGNTY ALONE. It is controllable by the federal government only, and to that government alone is it amenable.

INFORMATION IN NATURE OF QUO WARRANTO CAN LIE ONLY IN NAME OF UNITED STATES, and in the federal courts, against those who invade a franchise granted by the national government.

INFORMATION IN NATURE OF QUO WARRANTO WILL NOT LIE IN STATE COURT to try the right to the office of director in a bank organized under the national currency act. This is one of that class of cases where jurisdiction in the state court is utterly incompatible with the necessary jurisdiction of the national government.

JURISDICTION TO ISSUE INFORMATION IN NATURE OF QUO WARRANTO FROM STATE COURT, to try the right to the office of director in a bank organized under the national currency act, is not conferred by the amended currency act of 1864, section 57, which provides that suits against the national banks may be instituted in either the federal or state courts.

INFORMATION in the nature of a *quo warranto*, to try the right to the office of director in the First National Bank of West Meriden, a corporation organized under the national currency act. The information was filed in the name of the state of Connecticut, by the relator J. Wilcox, against Samuel J. Curtis. Wilcox claimed that, on January 14, 1865, he was a stockholder in said corporation; that he owned more than ten shares of stock therein, etc.; that he was at that time, and long had been, a director of said corporation; that he was, at an election held on said date, re-elected a director of said corporation; but that notwithstanding his election and acceptance, Curtis, without any legal warrant, claimed to be a director in place of Wilcox, used and exercised the said office, and usurped its liberties, rights, privileges, etc., to the damage and prejudice of the relator, etc. Wilcox prayed that Curtis be required to answer by what authority he supported his claim. The respondent demurred to the information, and the case was reserved upon the demurrer, for the advice of the court.

J. S. Beach and Fay, in support of the demurrer.

Doolittle and O. H. Platt, contra.

By Court, BUTLER, J. The power to create a corporation is an attribute of sovereignty; and the government of the United States created the corporation in question, in the exercise of that independent and supreme sovereign power which the people delegated to it by the constitution. It is therefore the creature of that sovereignty, and amenable to and controllable by it, and by none other.

An information in the nature of a *quo warranto* against a corporation lies only at the instance and in the name of the sovereign power which created it: *Wallace v. Anderson*, 5 Wheat. 291. The original writ so lay against any person who usurped any franchise or liberty against the king, or for mis-user or non-user of franchises or privileges granted by him. The information in the nature of a *quo warranto*, authorized by the statute of the 9th of Anne, at the relation of any person against any other person usurping, intruding into, or unlawfully holding any franchise or office in any corporation, is but an extension and simplification of the ancient writ, and is grantable only where that would lie. In England it lies in the name of the sovereign against those who usurp such franchises, because such usurpation is in derogation of the rights

of the crown. In this country it lies in the name of the government, against those who usurp such franchises, because grantable or granted by the commonwealth.

"The state or commonwealth," says Mr. Angell in his work on corporations, "stands in the place of the king, and has succeeded to all the prerogatives and franchises proper to a republican government. With us, therefore, to assume a power which cannot be exercised without a grant from the sovereign authority, or to intrude into the office of a private corporation, contrary to the provisions of the statute which creates it, is, in a large sense, to invade the sovereign prerogative and to assume or violate a sovereign franchise." And the cases cited fully sustain his positions. Upon the same principles the information can lie only in the name of the United States, and in the federal courts, against those who invade a franchise grantable or granted by the national government.

As then the corporation in question is the creature of federal sovereignty, and in respect to its internal organization, operation, and continual existence, is amenable to and controllable by that sovereignty alone, and as the writ in question is promptly grantable by that sovereignty alone whose franchise has been invaded and violated, it would seem upon principle too clear for argument (if there be nothing more in the case), that the relator has erred in invoking the interference of another uninvaded and unviolated sovereignty, and the court below have erred in assuming jurisdiction and granting the writ.

Such is the obvious *prima facie* character of the case before us. But the plaintiff insists that there is no error, and makes several claims, founded upon the conflex character of sovereignty as it exists in this country, divided between the national and state governments.

1. He insists, in the first place, that this institution is amenable to state sovereignty, because it is located and its officers discharge their duties and perform their functions within this state. This claim is groundless.

It is indeed true, in the language of the supreme court of the United States (*Louisville R. R. Co. v. Letson*, 2 How. 555), that "a corporation created by a state to perform its functions under the authority of that state, and only suable there, though it may have members out of the state, is a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed

a citizen of the state." But this is not such a corporation. It was not created by us; it does not perform its functions under our authority; and it is the creature of and controllable by another and superior sovereignty. That other sovereignty is exercised over the whole country irrespective of state lines or state authority. It places its officers and agents and instruments wherever its necessities or its interests require, and necessarily within the limits of the states. With those officers and agents and instruments, in the exercise of their functions, state authority can in no way interfere. The national banks are its instruments by which it performs its functions in establishing a national currency; on that fact their constitutionality is placed, and in the exercise of the powers conferred upon them they are as independent of state control as the army, or navy, or the officers of the subtreasury and custom-house, or any other instrumentality by which the functions of the federal government are performed. No other view is compatible with the principles of our own jurisprudence, or those recognized and declared by the supreme court of the United States in numerous cases, and particularly in the exhaustive opinion of Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. 316.

2. The relator insists, in the second place, that the superior court has jurisdiction of the offense set forth in the information, because the judicial power of the federal and state governments is exercised concurrently by the courts of either, unless Congress has conferred exclusive jurisdiction, in respect to the subject-matter, on the federal courts, and no such exclusive jurisdiction has been conferred in relation to this. This claim is equally unfounded.

It is undoubtedly true that the state courts retain jurisdiction over some matters, to which, by the constitution and laws of the United States, jurisdiction is given to the federal government and courts, and in respect to which jurisdiction appertained to and was exercised by the state courts prior to the adoption of that constitution. On that subject, the rule seems to be, that the state courts retain the jurisdiction which they had before that event, except where it was taken away by an exclusive constitutional grant of jurisdiction to the federal government; or Congress have made the jurisdiction exclusive in the federal courts; or the exercise of the jurisdiction is repugnant to and incompatible with such exercise by those courts.

But the cases where such concurrent jurisdiction can be

entertained by the courts of the states are few. Most of those where such jurisdiction has been sustained by the supreme court of the United States, and all to which we have been particularly referred, were cases of a criminal character, where the act was an offense against both sovereignties, and punished by a law of the state. Here there could be no jurisdiction anterior to the adoption of the constitution. Nor has there been any invasion of the sovereignty of this state, or violation of its laws, or any offense which the state is called upon to redress in its own behalf. It is a clear principle, that where there has been no offense there can be no judicial jurisdiction; and equally clear that a state has no authority to enforce a national law in behalf of the national government.

And this is one of that class of cases where jurisdiction in the state court is utterly incompatible with the necessary jurisdiction of the national government. The corporation in question, being the creature and instrument of that government, must necessarily be subject to that alone. By the common law, and by our statute, an information of this character lies as well to deprive a corporation of its charter as to determine the rights of its competing officers; and if the relator is right in this claim, its charter can be taken away, and its franchises seized by the courts of the state. Nothing could be more repugnant in character than such an unauthorized interference, for such a purpose, or for any purpose.

3. The plaintiff claims, in the third place, that concurrent jurisdiction of the subject-matter is conferred upon the state courts by the amended currency act of 1864, section 57, which provides "that suits, actions, and proceedings against any association. under this act, may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases; provided, however, that all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located." To this claim also we find it impossible to assent.

The information in the nature of a *quo warranto*, although grantable to determine a private right to an office in a corporation, between party and party, as well as to determine the right of the corporation to the franchise assumed, and a civil

proceeding, must be filed and issued in the name of the sovereignty which created the corporation, and is still so far forth a prerogative writ. Congress, in the exercise of its authority to apportion the judicial power among the inferior federal courts, has been very cautious in conferring the power to grant prerogative writs. That power is nowhere conferred, in express terms, upon the circuit or any other federal court located in the states. They did not attempt to confer the power to grant a *mandamus* upon the supreme court as a matter of original jurisdiction, but that court in *Marbury v. Madison* held the act unconstitutional, on the ground that it was not competent for Congress to increase the original jurisdiction of the supreme court. By the eleventh section of the judiciary act of 1789, jurisdiction was given to the circuit courts of all suits of a civil nature at common law and in equity to the amount of five hundred dollars or more between certain parties. This writ, though in its nature grantable at the discretion of the court, is one of right, and constitutes a suit within the meaning of that term as used in the act, but is not of the character, or between the parties, contemplated by it.

The fourteenth section also authorizes the circuit and other federal courts "to issue writs of *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." But the supreme court in *McIntire v. Wood*, 7 Cranch, 504, and *M'Clung v. Silliman*, 6 Wheat. 598, and *Kendall v. United States*, 12 Pet. 524, held that the circuit courts within the states had not power under those sections to grant a *mandamus*, which is one of those writs, unless necessary for the exercise of their jurisdiction within the limits prescribed, although the power was sustained in the latter case as having been given to the circuit court of the District of Columbia. The granting of those writs undoubtedly appertains to the judicial power of the government; but that part of the power seems not to have been conferred by Congress upon any of the courts but that of the District of Columbia in prescribing their jurisdiction, except as incident to and necessary for the exercise of the other special powers with which they are clothed. The circuit court of the United States for this district has not the power therefore to issue a *quo warranto* in a case like this by virtue of any general jurisdiction. And is it to be assumed that Congress, having been thus cautious of intrusting the federal courts with

that power, intended nevertheless to confer it by the language quoted, and not only on the federal but upon the state courts? to delegate to the state courts a part of their sovereignty? to submit a corporation—a creature of their creation, and an instrument by which they perform one of their functions—to the absolute and unrestrained supervision and control of the courts of another sovereignty, especially when by the act which created it they reserved to their own officers unusual supervisory power and control? I think not. And if the case turned upon that question alone, I should be strongly inclined to the opinion that Congress intended by the clause quoted to provide a more convenient forum for determining the ordinary questions which must naturally arise between the corporations and others in the course of their business, and intended no more.

But there is another and conclusive objection to this claim of the plaintiff. The section in question authorizes suits against the corporation only. This is not a suit against the corporation, but a proceeding by one individual against another individual competing for the office of director of it; and it is not within the letter or spirit of the act.

For these reasons we advise that the information is insufficient, and the demurrer should be sustained.

In this opinion the other judges concurred.

INFORMATION IN NATURE OF QUO WARRANTO MAY BE PROSECUTED, AT WHOSE SUGGESTION: See *Commonwealth v. Oluley*, 94 Am. Dec. 75; *Commonwealth v. Union Ins. Co.*, 4 Id. 50.

QUO WARRANTO, OBJECT OF: See *Commonwealth v. Murray*, 14 Am. Dec. 614; as to pleadings and proceedings therein, see extended note to *People v. Rensselaer etc. R. R. Co.*, 30 Id. 44-52.

QUO WARRANTO, NATURE OF WRIT OF: *Commonwealth v. Oluley*, 94 Am. Dec. 75; *State v. Harris*, 36 Id. 460.

QUO WARRANTO, INFORMATION IN NATURE OF, ISSUES AT INSTANCE OF GOVERNMENT WHEN: *People v. River Raisin etc. R. R. Co.*, 86 Am. Dec. 64.

BOARDMAN v. MERIDEN BRITANNIA CO.

[85 CONNECTICUT, 402.]

PRINCIPLES OF LAW OF TRADE-MARK STATED.

TRADE-MARK, WHEN ENTITLED TO PROTECTION. — A trade-mark adopted by a merchant or manufacturer for his goods is not entitled to protection as his exclusive property, unless it in some manner designates the true origin or ownership of the goods.

HOW ORIGIN AND OWNERSHIP OF GOODS MAY BE DESIGNATED IN TRADE-MARK — VIOLATION OF TRADE-MARK, HOW EFFECTED BY IMITATION OF DEVICE. — Name of manufacturer, used by him as trade-mark, may have added to and connected with it some peculiar device as auxiliary to the name in declaring the true origin and ownership of his goods; and a wrongful violation of such a trade-mark may be effected, even though the name of the imitator be substituted for that of the original manufacturer by such an imitation of the device as indicates a design to deceive, and is calculated to deceive, the public as to the true origin and ownership of the goods.

FIGURES INDICATING NUMBERS MAY BE PROTECTED AS TRADE-MARKS, ESPECIALLY WHEN THEY ARE ASSOCIATED WITH NAME OF MANUFACTURER upon labels of certain form, color, and arrangement, and in connection with such labels are used by him to indicate his own manufacture; for by virtue of such connection they form an important part of the trade-mark.

LABELS WITH NUMBERS CONSTITUTE LEGAL TRADE-MARKS, AND ARE ENTITLED TO PROTECTION AS SUCH WHEN. — Where a manufacturer of britannia spoons, for the purpose of distinguishing them from all other britannia spoons in the market, and for the purpose of designating different classes of his own spoons, adopts several different labels of particular size, form, and color, with his own name thereon, together with some term descriptive of the spoons, and in connection therewith certain figures arbitrarily chosen, the different classes of spoons being indicated by fixed numbers; and these labels constitute the only trade-mark under which he introduces his spoons into market; and under these labels and numbers the spoons have become generally and favorably known, and a large demand has grown up for them; and they are generally bought and sold by the numbers on the labels, — the labels thus arranged and used constitute legal trade-marks, and are entitled to protection.

SAME — USE OF SIMILAR NUMBERS ON LABELS AS VIOLATION OF TRADE-MARK, THOUGH IMITATOR'S NAME IS USED INSTEAD OF ORIGINAL MANUFACTURER'S. — Where another manufacturer makes spoons similar to those referred to above, though differing somewhat in style, and prepares labels resembling the above, and adopts the same numbers for spoons of a similar kind; the labels being so nearly alike that a purchaser not reading the name upon them might be deceived; and where such labels are adopted with those particular numbers for the purpose of aiding the introduction of his spoons into the market, — it is a violation of the trade-mark of the first manufacturer, although the second manufacturer puts his own name on the labels in the place of that of the first. And the use of the same figures with a cipher prefixed does not vary the case.

PETITION for an injunction against the use of certain labels claimed to be a violation of the petitioners' trade-mark. The petitioners, L. and N. S. Boardman, were partners under the name of L. Boardman and Son, and after the formation of the copartnership in 1863 carried on the business of manufacturing britannia spoons of various styles and sizes. L. Boardman had previously carried on the business alone. The petitioners produced spoons of a superior and desirable quality, and for years had prepared and put up the spoons so manufactured by them, in boxes, packed, labeled, and numbered as shown below. L. Boardman had put up and packed his spoons in boxes of the same style and colors with these, and adopted these labels, and the numbers printed thereon, for the purpose of distinguishing the spoons of his manufacture from all other britannia spoons in the market, and for the purpose of designating different classes of his own spoons. From 1853 to 1866, the respondents had purchased one hundred and thirty-eight thousand dollars' worth of petitioners' spoons to sell to their own customers. There was no indication as to who was the maker of the spoons they sold, except the numbers. In 1866 the respondents began to manufacture spoons similar in character, etc., as shown in the opinion, except that their own name was substituted on the labels for that of L. Boardman. A sample of these labels is given below. The respondents' spoons were prepared for market in the same manner that they had prepared the petitioners' spoons before sold by them. The respondents sold large quantities of their own spoons thus prepared; but they did not sell under any false color or pretense that they were manufactured by the petitioners, other than such as might be inferred from the similarity of the labels used by them to the labels of the petitioners. They had no absolutely fraudulent design, but believed that numbers could not be legally claimed as a trade-mark. As soon as petitioners found out that the respondents were using these numbers, the latter were notified that the numbers on the labels were the trade-mark of the petitioners, and forbidden to use the same. After the service of a temporary injunction, the respondents continued to use the same numbers, placing "0" before the same, and filled orders for the old numbers, by sending the corresponding number which they had adopted by placing a cipher before it. Thirty-two different numbers were used by the petitioners on their different labels, the different labels being used for different styles

SAMPLE OF PETITIONERS' LABELS.

1-2 GROSS L. BOARDMAN'S No. 2340,
WIRE STRENGTHENED, FRENCH TIPPED,
TEA SPOONS.

SAMPLE OF RESPONDENTS' LABELS.

1-2 GROSS MERIDEN BRIT^A CO.'S No. 2340,
WIRE STRENGTHENED, FRENCH TIPPED, OVAL THREAD,
TEA SPOONS.

and sizes of spoons. They were generally green in color, but a few were of steel color. The different labels used by the respondents were of the same size and color as the corresponding labels of the petitioners, and the same figures were used for the same classes of spoons. Other facts, reported by a committee to whom the case was referred, are stated in the opinion. The case was reserved for the advice of the supreme court of errors.

A. P. Hyde and Culver, for the petitioners.

Doolittle and O. H. Platt, for the respondents.

By Court, CARPENTER, J. The office of a trade-mark is to designate the true origin or ownership of the article or fabric to which it is affixed. When any mark, symbol, or device is used merely to indicate the name, quality, style, or size of an article, it cannot be protected as a trade-mark.

The object or purpose of the law in protecting trade-marks as property is twofold: 1. To secure to him who has been instrumental in bringing into market a superior article of merchandise the fruit of his industry and skill; 2. To protect the community from imposition, and furnish some guaranty that an article purchased as the manufacture of one who has appropriated to his own use a certain name, symbol, or device as a trade-mark, is genuine. Consequently the violation of

property in trade-marks works a twofold injury; the appropriator suffers in failing to receive that remuneration for his labors to which he is justly entitled, and the public in being deceived, and induced to purchase articles manufactured by one man under the belief that they are the production of another.

It must not be inferred, however, that an injury to the purchaser and an injury to the proprietor of a trade-mark must concur in any given case in order to maintain an action; as either, of itself, is sufficient to entitle the party injured to his legal remedy. Thus an imitator of a trade-mark may not defend as against the true owner, by showing that the article sold by him is as good as the representation implied by the use of the trade-mark; while such fact may, perhaps, be shown in defense, or at least in mitigation of damages, in an action on the case by the purchasers. And on the other hand, in the latter class of actions, the injury to the original appropriator forms no part of the plaintiff's case.

A leading case on this subject is *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 599. Mr. Upton in his work on trade-marks, page 136, upon a careful examination of that case, has deduced from it certain principles which seem to have been sanctioned and affirmed by later decisions; and which, with the exception perhaps of the last, may now be regarded as the settled law of this country. I quote only those which seem to have more immediate reference to the case now under consideration; and will then briefly apply them to the facts of the case.

"1. That a trade-mark adopted by a manufacturer or merchant for his goods, to be clothed with the attributes of property, entitling the appropriator to protection in its exclusive use, must, by word, letter, sign, figure, or symbol, designate the true origin or ownership of the goods.

"2. That where a trade-mark is violated, the essence of the wrong done consists in the sale of the goods of one manufacturer as and for the goods of another, and therefore that such violation can only be predicated of a copy or imitation of a trade-mark, or those portions of a trade-mark which truly designate the origin or ownership of the goods.

"3. That a similarity between two trade-marks, used by different manufacturers for their goods, although of such a character as to induce a belief in the mind of the public that they belong to and designate the goods of the same manufacturer or trader, is not of itself sufficient ground for a prohibi-

tion of the use of such trade-mark by him who did not first adopt it. That similarity, to entitle the originator to the protection of the law, must be such as to amount to a false representation, not alone that the two articles have the same origin, but that the goods to which the simulated mark is attached are the manufacture of him who first appropriated the trade-mark."

"5. That a violation of a trade-mark consisting of a false declaration, by a copy or imitation of those parts of the trade-mark imitated which indicate the true origin or manufacture of the goods,—it is not essential to the interposition of judicial restraint that the imitation should be exact or perfect. Though a limited and partial imitation, containing variations that a comparison with the original would instantly disclose, it may yet be manifest that a resemblance exists, which was designed to mislead, and which has actually misled, the public, or probably, or even possibly, may do so in that particular which constitutes the wrong.

"6. That the name and address of the manufacturer, used by him as a trade-mark, may have added to and connected with it some particular device, vignette, emblem, symbols, forms, or figures adopted as auxiliaries to the name and address, in declaring the true origin and ownership of the merchandise, and a wrongful violation of such a trade-mark may be accomplished, even though the name of the original manufacturer be omitted, and that of the imitator be substituted, by such an imitation of the peculiar device, vignette, emblem, symbol, form, color, or figure alone, as indicates a design, and is calculated to mislead and deceive the public as to the true origin and ownership of the goods."

1. Both parties seem to regard the use of numbers as giving rise to the most important and most material question in the cause. The petitioners rely upon them as the most prominent, valuable, and distinctive feature in their trade-marks. The respondents claim that if in any case numbers can be legally appropriated as trade-marks, they were not so appropriated in this case; and that so far as they tend to indicate ownership, it is only so by an association of ideas, and by giving to them a meaning which they were not originally designed to have. If this be so, or if the numbers were used solely to indicate the different patterns, styles, or sizes, it is clear from the view we have taken of the law that the respondents ought not to be restrained from their use. Whether in any case numbers

alone may be legitimately appropriated as trade-marks, is a question not necessarily involved in the case. It may be difficult to give to bare numbers the effect of indicating origin or ownership; and it may be still more difficult to show that they were originally designed for that purpose; but if it be once shown that that was the original design, and that they have had that effect, it may not be easy to assign a reason why they should not receive the same protection, as trade-marks, as any other symbol or device. But in this case the numbers were associated with the name of the petitioner, and the form, color, and general arrangement of the labels; and by virtue of that connection, form an important part of the trade-mark itself. By a reference to the facts found, it will appear that Luther Boardman, one of the petitioners, "adopted the several labels of the size, form, and colors stated, and the numbers printed thereon, for the purpose of distinguishing the spoons of his manufacture from all other britannia spoons sold in market." And also, "that the labels described in the petition, in connection with the name 'L. Boardman,' and especially the numbers thereon, constituted the only trade-marks under which the petitioners introduced their spoons into market; that under these labels and numbers their spoons had become generally known in market, and had obtained a good reputation, and there had grown up a large demand for the petitioners' spoons; that those spoons were known by their respective numbers, and were generally ordered, bought, and sold by the numbers on the labels."

From this finding, we entertain no doubt that the labels thus arranged, adopted, and used constituted legal trade-marks, and are entitled to protection.

2. Have the respondents violated the petitioners' rights by an imitation of their trade-marks? It seems that the respondents manufactured "spoons similar in character to those made by the petitioners, though differing somewhat in style or pattern, and prepared labels resembling those of the petitioners, and adopted the same numbers as had been adopted by the petitioners, adapting said numbers to similar kinds of spoons."

The presumption of a designed imitation, arising from the similarity of the spoons, the resemblance of the labels, and the identity of the numbers, would be very strong if all these circumstances were found to exist in reference to only one kind; but when the case finds, as it does, that they do exist

in respect to several different kinds, the presumption is vastly strengthened. It further appears that the similarity of the labels was "so close an imitation that an unwary trader might be deceived, but no one reading the label would be deceived thereby; that the respondents adopted the labels and numbers, as set forth in the petition, for the purpose of aiding the introduction of their spoons into market," etc.

It is true that the respondents put their own name on the labels used by them in place of that of the petitioners; but that is not sufficient to destroy the effect of the imitation in other respects; especially in respect to the numbers. They had been in the habit of selling Boardman's spoons, and of selling them by their numbers. And when customers ordered spoons of a certain number of the respondents, they expected to receive Boardman's spoons. On receiving them, the most prominent feature of the label, and the one most likely to attract attention, would be the number. That being right, and the labels generally resembling the petitioners', the name would hardly be likely to attract attention, and if it did, it is by no means certain that they would be particular to observe that the name indicated the makers of the article rather than dealers therein. The importance attached to these numbers is further shown by the fact that since the temporary injunction the respondents have used the same numbers with a cipher prefixed.

On the whole, we are satisfied that, although the name of the imitator was substituted for that of the original proprietors, and that the imitation in other respects may not be exact, a resemblance exists which was designed to mislead; and which, under the circumstances, was well calculated and likely to produce that result.

3. Have the petitioners suffered damage? On this point there is no room for doubt. The finding of the committee is explicit, "that said respondents have sold large quantities of their spoons so put up in place of spoons manufactured by the petitioners, as alleged in the petition." It is also apparent from what has already been said that the petitioners are in danger of still further loss, unless protected by an injunction. The circumstance that the respondents now prefix a cipher to the numbers would hardly vary the result. Their motive is apparent. They may succeed in reaping some advantage from the numbers as thus used, but it is manifest that it will be at the expense of the petitioners.

We advise judgment for the petitioners.

In this opinion the other judges concurred.

RIGHT TO TRADE-MARK IS PROPERTY, AND ITS INFRINGEMENT WILL BE ENJOINED: See cases cited in note to *Bradley v. Norton*, 87 Am. Dec. 204; *Derringer v. Plate*, 87 Id. 170.

IMITATION OF TRADE-MARK CALCULATED TO DECEIVE IS INFRINGEMENT, AND WILL BE ENJOINED: See cases cited in note to *Bradley v. Norton*, 87 Am. Dec. 204; *Taylor v. Carpenter*, 42 Id. 114.

TRADE-MARK, TO BE VALID, MUST INDICATE ORIGIN OR OWNERSHIP of the article upon which it is placed: See extended note to *Partridge v. Menck*, 47 Am. Dec. 287, showing that names, numbers, letters, etc., may be the subject of a valid trade-mark. The principal case is cited at page 294.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: It seems to be the office of a trade-mark to point out the true source, origin, or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers: *Marshall v. Pinkham*, 52 Wis. 578; *Canal Co. v. Clark*, 13 Wall. 323. In all cases where rights to the exclusive use of a trade-mark are invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; but it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief: See cases last cited, where numerous other cases to the same point, besides the principal one, are cited. The resemblance and deception are matters of fact to be determined in each case: *Meriden Britannia Co. v. Parker*, 39 Conn. 461. In *Gilman v. Hunnewell*, 122 Mass. 139, 152, it was held that a court of equity will not restrain a defendant from the use of a label, on the ground that it infringes the plaintiff's trade-mark, unless the form of the printed words, the words themselves, and the figures, lines, and devices are so similar that any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other. At page 152 the court cited a number of cases, among them the principal one, showing that the variation appeared to the court to be merely colorable, and that the form and particulars of the marks or labels were not given in the reports. This is, however, not wholly true of the principal case, as shown by its facts above. In *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 327, the principal case was cited as showing the difficulty of giving to bare numbers the effect of indicating origin or ownership, and of showing that the numbers used were originally designed for that purpose. In that case it was held that numerals, arbitrarily selected, and used on goods in combination with other devices to denote the origin of the goods, and not their quality, are a valid trade-mark; and that a person who uses them, in combination with other devices which he has a right to use, may be restrained by a bill in equity from so using them, if he does so for the purpose of imitating the trade-mark, and his use is calculated to deceive and does deceive persons buying his goods.

GREGORY v. BROOKS.

[85 CONNECTICUT, 487.]

INJURIES TOO REMOTE TO CONSTITUTE CAUSE OF ACTION. — Where one is injured by the wrongful act of another, and others are indirectly and consequentially injured, but not by reason of any natural or legal relation, the injuries of the latter are too remote to constitute a cause of action.

INDIRECT AND CONSEQUENTIAL INJURIES ARE ACTIONABLE WHEN. — Where one is injured by the wrongful act of another, and others are indirectly and consequentially injured, the injuries of the latter are actionable, though not directly committed upon the plaintiff in the case, if they were maliciously and fraudulently intended to affect, and did injuriously affect, him in his contract or business relations.

DECLARATION SETS FORTH GOOD CAUSE OF ACTION FOR INDIRECT AND CONSEQUENTIAL INJURY where it alleges that the defendant falsely and fraudulently represented himself to be a superintendent of wharves, and as such ordered the captain of a vessel which was discharging at the plaintiff's wharf to remove therefrom, by which the plaintiff lost the profit that he was to have received for the use of his wharf, and which he would otherwise have received; and that said acts of the defendant were maliciously and fraudulently done with intent to injure the plaintiff and defraud him of his just profit from the use of the wharf.

INJURY DONE TO ONE WITH MALICIOUS OR FRAUDULENT DESIGN TO INJURE ANOTHER THROUGH CONTRACT RELATION — GIST OF ACTION FOR, AND EVIDENCE THEREIN. — The pivotal fact in an action against a wharf superintendent for wrongfully ordering the captain of a vessel discharging at plaintiff's wharf to remove therefrom, whereby the plaintiff was injured and deprived of his wharfage, is the existence of a malicious and fraudulent design to injure the plaintiff and to deprive him of his wharfage. If that existed, the action lies, and the plaintiff is entitled to recover. If that did not exist, the injury to the plaintiff is remote, and he cannot recover. It is essential that the declaration should contain allegations averring such a design, and such allegations must be proved as laid.

INSTRUCTIONS WERE HELD ERRONEOUS IN ACTION AGAINST WHARF SUPERINTENDENT for wrongfully ordering the captain of a vessel discharging at plaintiff's wharf to remove therefrom, whereby the plaintiff was injured and deprived of his wharfage, where the jury were charged that it was not enough for the defendant simply to have believed that he had no authority to make the order complained of and to have made the same in good faith, but that he was bound to act with reasonable caution. The defendant was entitled to an instruction that there could be no recovery unless he had acted with a malicious and fraudulent design to injure the plaintiff.

TRESPASS on the case. Plaintiff owned a certain wharf in the city of Bridgeport. A certain brig, named the *Brilliant*, moored to said wharf and commenced to discharge four hundred tons of coal. Defendant claimed to be a harbor-master and superintendent of wharves, and as such ordered the cap-

tain of the *Brilliant* to haul said vessel astern and far enough to permit a canal-boat lying in the river to obtain a berth at the elevator on the wharf of Miller & Co., referred to in the opinion. At the time appointed by Brooks for the removal of the *Brilliant*, he appeared and threatened to fine said captain thirty dollars unless he hauled said brig away from her berth at said wharf "within two minutes." The wharfage which plaintiff would have received amounted to more than one hundred dollars. The defendant's order was made at the request of Miller & Co., who wished to have grain on the canal-boat unladen at their wharf. It was admitted by the plaintiff that the defendant was the only person appointed superintendent of wharves in the city, and by the defendant that a compliance with the order would have removed the brig so far astern that the remainder of her cargo could not have been discharged upon the plaintiff's wharf. Verdict for the plaintiff. Defendant filed a bill of exceptions; and also filed a motion in arrest of judgment for the insufficiency of the declaration, which motion was overruled. Defendant then took the record before the superior court, for revision, by a motion in error, and the case was reserved by that court for the advice of this court. The errors assigned were the overruling of the motion in arrest of judgment, the instructions of the court, and the omissions to instruct. The questions raised by the assignment of errors and other facts appear in the opinion.

Beardsley and Sumner, for the plaintiff in error.

Treat and Blake, for the defendant in error.

By Court, BUTLER, J. The first error assigned upon the record is, that the city court erred in not arresting the judgment for the insufficiency of the declaration. We do not think the error manifest.

It is undoubtedly true that where one is injured by the wrongful act of another, and others are indirectly and consequentially injured, but not by reason of any natural or legal relation, the injuries of the latter are deemed too remote to constitute a cause of action. The doctrine was fully discussed and settled in the case of *Connecticut Mutual Life Ins. Co. v. New York and New Haven R. R. Co.*, 25 Conn. 265 [65 Am. Dec. 571]. We have no desire or intention to weaken the force of that decision. The consequences which would result

if the rule were different are too momentous to permit the doctrine to be questioned.

But it was admitted by the distinguished counsel who argued that case, and by the eminent judge who gave the opinion of the court, that the rule might be different where an injury is done to one with a malicious or fraudulent design to injure another through a contract relation. And the cases are numerous where injuries have been holden actionable, although not directly committed upon the plaintiff in the case, if they were intended to affect, and did injuriously affect, him in his contract or business relations. Several of the early English cases are cited in Swift's Digest, page 562, and there are modern cases in this country of a similar character.

Referring to the declaration, we find that in some or all the counts the defendant is charged with having falsely claimed and represented himself to be a superintendent of wharves and harbor-master, and as such to have issued an order directing the captain of a vessel which was moored at the wharf of the plaintiff to remove therefrom. We find it further averred that the captain was in the act of discharging, and the plaintiff of receiving, a cargo of coal from the vessel; that the plaintiff owned and kept such wharf for the purpose of letting the same and receiving wharfage therefor, as a source of profit and gain to him; that by means of such representations and order, the captain of the vessel was caused and induced to remove from said wharf to the wharf of another person, and there discharge his cargo; and that by reason of such removal the plaintiff lost the wharfage which he otherwise would have received, and was damnified thereby. It is further alleged that the representations and acts of the defendant were made and done with a fraudulent and malicious purpose and design to injure the plaintiff, and prevent him from making the gain and profit which he would have made from the occupation of his wharf by the vessel.

Now this case differs essentially, as presented by the declaration, from the case of *Connecticut Mutual Life Ins. Co. v. New York & N. H. R. R. Co.*, 25 Conn. 265 [65 Am. Dec. 571], and that of *Anthony v. Slaid*, 11 Met. 290, in which the opinion was given by Judge Shaw. There is here averred, not only the essential element of a fraudulent and malicious design to injure the plaintiff, as the governing motive of the defendant's conduct, but that the fraudulent representations and acts were made and done to one sustaining a business relation with the

plaintiff, with a view of disturbing and breaking up that business relation, and an averment that the relation was disturbed, and that the plaintiff lost a gain and profit by reason of that disturbance. And although the representations and order are alleged to have been made to the captain of the vessel as occupant of the wharf, they are not alleged to have been made with any design to injure him, or any other design than to injure the plaintiff. It is not easy to see how this case can be distinguished in principle from the case where a tenant at will was frightened out of his occupation with intent to injure the landlord, or the customer fraudulently prevented from taking his horse to a market to prevent the owner from obtaining his toll, or children prevented by fright from attending a school, to the injury of the school-master, or from many other cases where men have been fraudulently and maliciously injured indirectly through their business relations.

For these reasons we think the motion in arrest was properly overruled.

But we are satisfied that the case was not properly presented to the jury. It appears from the bill of exceptions that the defendant was in fact superintendent of wharves; that as such he had authority upon the application of any owner of a wharf to remove a vessel therefrom; that the vessel in question which lay at the wharf of the plaintiff extended some distance in front of the wharf of Miller & Co., who were adjoining owners; that Miller & Co. had a vessel in the stream which was prevented from coming to the wharf by the obstruction; that they applied to the defendant as superintendent of wharves to order the vessel which was lying at the plaintiff's wharf to be removed; and that thereupon the defendant issued the order set out in the declaration. The parties were at issue in relation to the extent of the defendant's powers, and the construction of the order, as to whether the order was or was not a legal one. That question was submitted to the jury as a mixed question of law and fact, but in relation to that submission no complaint is made. The defendant also claimed and offered evidence to prove that in the matters in dispute between the parties he acted in good faith, without any malice or fraudulent intent toward the plaintiff, but in the belief that he was doing his duty as a public officer of the city. This claim presented the pivotal fact in the case, for if there was no fraudulent or malicious design in what he did or said to injure the plaintiff and prevent him from acquiring the gain and profit

which he expected to acquire, and would have acquired, then there was no actionable injury to the plaintiff, and the defendant was entitled to a verdict. On this point the defendant made four claims to the court, and requested a corresponding charge to the jury. The import of the first two of those requests was, that the allegations that the acts complained of were done fraudulently and maliciously with intent to defraud the plaintiff must be proved as laid to entitle the plaintiff to a verdict; and the import of the third and fourth requests was, that if the jury found that the acts were done without any intent to injure the plaintiff or deprive him of any profits or pecuniary benefits, or if the defendant believed that he was acting in the line of his duty as an officer, and did the acts in good faith without any fraudulent intent or malice toward the plaintiff, he was not liable, although not in law or fact such an officer.

The court charged in conformity with the first two requests, but not in conformity with the last two, and further charged them that it was not enough for the defendant simply to have believed that he had authority to make the order complained of, and that he made the same in good faith; he was bound to act with reasonable caution. Here there was manifest error. The turning question in the case was, whether the defendant was acting with the fraudulent and malicious design to injure the plaintiff, and deprive him of his wharfage, or whether he was acting as a public officer, in good faith, in the belief that he was doing his duty, without such malicious and fraudulent design. The whole case then turned upon the question of the existence of such a design. If that existed, the action lay, and the plaintiff was entitled to recover. If that did not exist, the injury to the plaintiff was remote, and he could not recover. The defendant asked the court, in the second and third requests, to charge, and they did charge, the jury that the allegations in the declaration averring such a design were essential allegations, and must be proved. The defendant asked the court, in the fourth and fifth requests, to charge the jury that if they found the acts were done without any such design, but in good faith, believing that he was a public officer, and had a right to do them, then the plaintiff could not recover, and the court did not so charge. But the fourth and fifth requests contain a repetition, in a different form, of the same proposition which was contained in the other two, and which the court recognized, and the defendant was entitled,

in such a peculiar case, to have the proposition repeated to the jury in the manner requested. And when the court not only declined to charge as requested, but added what imported, substantially, that the plaintiff might recover notwithstanding the defendant acted in good faith as a public officer, believing that he had authority so to act, and without any such design, "if he did not act with reasonable caution," they misled the jury, and did injustice to the defendant. They ignored the only rule on which the case could be sustained, and applied a rule in favor of the plaintiff which might have been proper in a suit brought by the captain of the brig, but which had no just application to the case.

For these reasons, the superior court is advised to reverse the judgment.

In this opinion the other judges concurred.

DAMAGES TO BE RECOVERABLE MUST, IN GENERAL, BE NATURAL AND PROXIMATE CONSEQUENCE of the act complained of: See *Clark v. Pacific R. R.*, 90 Am. Dec. 458, note 462; note to *Scott v. Hunter*, 84 Id. 548; *Donnell v. Jones*, 48 Id. 59; *Harrison v. Berkley*, 47 Id. 578. So where loss or injury complained of is not the direct and immediate result of the defendant's wrongful act, no action can be maintained: *Silver v. Frazier*, 81 Id. 662. Sale of liquor to third person, knowing it to be for a slave, creates as great a liability in regard to the consequences, where fatal, as though the sale was immediately to the slave: *Harrison v. Berkley*, 47 Id. 578. The doctrine of *causa proxima, non remota, spectatur*, is discussed in *Scott v. Hunter*, 84 Id. 542, and note 548.

THE PRINCIPAL CASE again came before the court in *Gregory v. Brooks*, 37 Conn. 365, a new trial having been granted; and it was there held, in an action on the case for damages for the injury to the plaintiff, Gregory, in his contract relation with the captain of the brig, that the question was not whether the defendant, Brooks, acted without legal right, or even with malice, but whether he was actuated by a positive design to injure the plaintiff by breaking up the contract relation in question; that it was not enough in such a case to show that the relations between the parties were unfriendly; that a person will be protected by the presumptions of the law in the performance of official duties, unless it is clearly shown that his motives are private and malicious, and that he has needlessly used his official power to gratify a spirit of revenge; that it was not necessary that the defendant should have been legally the superintendent of wharves; that it was enough if he was such *de facto*, or honestly supposed himself to be such, and believed it to be his duty to make and enforce the order in question; that for the purpose of showing that his acts were done with a private and malicious intent, evidence of any acts of hostility to the plaintiff, with the circumstances under which they occurred, would be admissible; and that a new trial should be granted for the exclusion of such evidence; but that strong evidence would be required to overcome the presumption that a public officer whose conduct is reasonable in itself is governed in such conduct by a sense of official duty.

SHERWOOD v. REED.

[85 CONNECTICUT, 450.]

EVIDENCE ADMISSIBLE FOR DEFENDANT IN ACTION FOR MALICIOUS PROSECUTION, AND WHICH MAY PROPERLY BE SUBMITTED TO JURY. — Where the defendant had made a complaint against the plaintiff before a justice of the peace, alleging that he had threatened him with personal violence, and that he was in fear of him, and praying that he be required to give sureties of the peace, and the plaintiff was acquitted by the justice, and brought an action against the defendant for a malicious prosecution, — it was held in the latter case that the defendant might show, 1. The quarrelsome character of the plaintiff, to warrant the belief that he had reason to fear that he would commit the violence threatened; 2. That the acquittal of the plaintiff was caused by the exclusion of legal evidence offered by the defendant; 3. That the jury might properly be instructed that upon the question of probable cause, they were to consider the fact of the exclusion of this evidence in connection with the fact of the acquittal.

TRESPASS on the case for a malicious prosecution. Verdict for the defendant. Plaintiff moved for a new trial for error in the rulings and instructions of the court. The facts are stated in the opinion.

Taylor and Sanford, in support of the motion.

Averill and Brewster, contra.

By Court, PARK, J. The principal question on the trial of this case in the court below was, whether the defendant had probable cause to fear, and did fear, that the plaintiff would inflict bodily harm upon him; that is, had he a reasonable ground of apprehension, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff would do what was laid to his charge in the criminal proceedings instituted by the defendant against him? and did he so believe? *Wilmarth v. Mountford*, 4 Wash. C. C. 82; *Foshay v. Ferguson*, 2 Denio, 618; *Broad v. Ham*, 5 Bing. N. C. 722.

In order to prove the affirmative of this question, the defendant offered evidence to show that the plaintiff had made certain threats of personal violence against him, and that the plaintiff was of such a character for quarrelsomeness that he would be likely to carry his threats into execution. The plaintiff objected to the evidence of character thus offered, but the court admitted it, provided the defendant could show that, at the time he instituted the proceedings against the plaintiff, he knew that such was his character.

It is obvious that the character of a threat depends very much upon the character of the party making it. Could it be claimed that a threat of violence coming from a powerful and ferocious pugilist is calculated to cause no more apprehension of bodily harm than if made by a feeble person, of a quiet, inoffensive, and peaceable disposition? The question is too clear for argument. See, on this subject, *Miller v. Brown*, 3 Mo. 127 [23 Am. Dec. 693], and *Bostick v. Rutherford*, 4 Hawks, 83.

In the argument of the case, the counsel for the plaintiff requested the court to charge the jury that the trial and acquittal of the plaintiff before the justice was *prima facie* evidence of the want of probable cause. The court charged them that in determining whether the defendant had acted without probable cause, they should take into consideration the facts of the trial and acquittal of the plaintiff before the justice, in connection with the other testimony offered upon that point. We see no error in this. It appears in the case that the defendant offered evidence to prove that the acquittal of the plaintiff was owing to the rejection of legal evidence by the justice. If this was true, we think the fact of acquittal by the justice was not entitled to that consideration upon the question of a want of probable cause that it otherwise should have had; for the judgment of the court acquitting the accused was final, no appeal or writ of error being allowed to the prosecutor in such cases. We think, therefore, that the court very properly left the whole question to the jury.

We do not advise a new trial.

In this opinion the other judges concurred.

PROBABLE CAUSE IN MALICIOUS PROSECUTION, WHAT IS, AND HOW TO BE DETERMINED: See *Miller v. Brown*, 23 Am. Dec. 693, note 696; *Ross v. Innis*, 85 Id. 373.

ACQUITTAL OF PLAINTIFF IN MALICIOUS PROSECUTION AS EVIDENCE OF WANT OF PROBABLE CAUSE: *Williams v. Vannmeter*, 41 Am. Dec. 644; *Griffin v. Chubb*, 58 Id. 85; *Grant v. Denel*, 38 Id. 228.

EVIDENCE OF CHARACTER IN MALICIOUS PROSECUTION SUFFICIENT TO ESTABLISH DEFENSE OF PROBABLE CAUSE: See note to *Hitchcock v. North*, 39 Am. Dec. 542.

CASE
IN THE
COURT OF CHANCERY
OF
DELAWARE.

GARDEN v. DERRICKSON.

[2 DELAWARE CHANCERY, 386.]

BOND UNDER SEAL FOR PAYMENT OF MONEY, THOUGH WITHOUT CONSIDERATION, creates a perfect obligation, both at law and in equity, and is impeachable only for fraud.

SEAL ON VOLUNTARY BOND IMPORTS CONSIDERATION, and gives to the instrument, in the absence of fraud, the effect of a bond executed for a consideration.

VOLUNTARY BOND UNDER SEAL FOR PAYMENT OF MONEY IS ENFORCEABLE as a debt against the obligor, and all volunteers claiming under him.

WHERE OBLIGOR IN VOLUNTARY BOND UNDER SEAL CONVEYS ALL HIS REAL ESTATE without consideration, a judgment recovered on the bond is in equity a charge upon the land in the hands of the grantees.

BILL in equity by the executrix of Francis R. Garden, deceased, against the grantees of Isabella Garden, deceased, praying that the real estate in the hands of the defendants stand charged with a certain judgment recovered against the administrator of Isabella Garden, deceased, on a voluntary bond under seal, executed and delivered by her to Francis R. Garden, deceased; and that a sale of the same be decreed, and the judgment paid out of the proceeds. In other respects, the opinion states the case.

T. F. Bayard, for the complainants.

Bradford and Higgins, for the defendants.

By Court, GILPIN, C. J. Isabella Garden executed and delivered to her son, Francis R. Garden, her bond or obligation, dated June 7, 1858, for the payment of seven thousand one

hundred dollars, with interest, the payment of the principal being subject to some special provisions not necessary to be stated. Afterward, by two deeds, she conveyed her real estate in part to her daughter, Mary A. C. Derrickson, in fee-simple, and the residue to trustees for the benefit of her son William A. Garden, and his children. These conveyances were wholly voluntary, being in consideration only of natural love and affection. Since the death of Mrs. Garden a judgment has been recovered on the bond against her administrator; and such proceedings have been had as are necessary under the statute to make the judgment a lien upon real estate of the decedent. Had she remained seised of the real estate in question until her death, it would, without controversy, have been subject to the judgment. The question then is, whether her conveyance of the real estate in her lifetime, without any valuable consideration, defeated the judgment. It is not disputed that had the bond on which the judgment was recovered been an ordinary debt, contracted for a valuable consideration, the conveyance of the real estate would, as against such debt, be void; or rather the land would stand charged, in the hands of the grantees, with its payment. But it is insisted for the defendants that the bond itself was voluntary, and that a court of equity will not aid a volunteer.

My view of the bond is this: it is a perfect legal instrument under seal; it is not a defective instrument, such as needs the aid of a court of equity to make it perfect. The aid required is the removal of an obstacle to its enforcement presented by the conveyances. The seal imports a consideration; by which is meant not merely that the seal is *prima facie* evidence of a consideration, but that it gives to the instrument, in the absence of fraud, the effect of a bond executed for a consideration. Whether it were given in fact for a consideration or not, it creates a perfect obligation, both at law and in equity, which is enforceable as a debt against the obligor and against all volunteers claiming under her. Such a bond can be impeached only on the ground of fraud.

I am of opinion, therefore, that the real estate remains in the hands of the grantees, charged with the judgment.

A decree was entered for the sale of the real estate, and for the payment of the judgment out of the proceeds.

WHETHER AND WHEN BOND UNDER SEAL MAY BE ENFORCED THOUGH WITHOUT CONSIDERATION. — The effect produced at common law by affixing

a seal to an instrument is, in its nature, as technical and arbitrary as the results which follow from the doctrine of livery of seisin. In theory, the common law demands the existence of a valuable consideration to render any contract valid and enforceable; but a molded form of wax, or other device constituting a technical seal, was declared to be conclusive evidence of such a consideration, and absence of any consideration could not be pleaded or proved in an action on a sealed instrument, though the evidence were clear and indisputable. If the consideration were immoral, illegal, contrary to the provisions of some express enactment, or against the policy of the law, this might be shown, for the contract would then be void. And so fraud or duress in procuring the execution of the agreement was a defense at law, but not fraud affecting the consideration only, for this was irrebuttably valuable and adequate if the obligor had affixed his seal: *Page v. Trufant*, 2 Mass. 162; *Guy v. McLean*, 1 Dev. 46. The reason assigned for this arbitrary rule is, that the act of sealing is a "deliberate and solemn" act, which implies great caution and a fullness of consent; and therefore a seal is said to import a consideration; 1 *Parsons on Contracts*, 428; *Sharlington v. Stratton*, *Flow.* 308; *Harris v. Harris*, 23 *Gratt.* 737. And the reason is quite as arbitrary as the rule.

At common law, therefore, a bond conditioned for the payment of a sum of money, a sealed promise to pay a sum of money, or a "single bill," was enforceable, though in fact it was voluntary and made without any valuable consideration; and in an action on such an instrument the defendant could not plead or prove either absence or failure of consideration. And this means was therefore sometimes adopted by a person who desired to give to a relation or friend a sum of money payable in the future: *Sharlington v. Stratton*, *Flow.* 308; *Fallowes v. Taylor*, 7 *Term Rep.* 475; *McCarty v. Beach*, 10 *Cal.* 462; *Leonard v. Bates*, 1 *Blackf.* 172; *Hanna v. McKennie*, 5 *B. Mon.* 314; *S. C.*, 43 *Am. Dec.* 122; *Bates v. Hinton*, 4 *Mo.* 78; *Center v. Billingham*, 1 *Cow.* 33; *Dale v. Roosevelt*, 9 *Id.* 307; *Vrooman v. Phelps*, 2 *Johns.* 177; *Dorlan v. Sammis*, 2 *Id.* 179; *Dorr v. Munsell*, 13 *Id.* 430; *Case v. Boughton*, 11 *Wend.* 106; *Gray v. Barton*, 55 *N. Y.* 68, 71; *Harris v. Harris*, 23 *Gratt.* 737. And the only plea that can be made in such an action is *non est factum*, payment, or release: *Mitchell v. Williamson*, 6 *Md.* 210. The plea of *nil debet* is bad if the bond is the gist of the action, and the recovery is of a sum *in numero*, though it is allowable where the bond is made mere matter of inducement: *Davis v. Burton*, 3 *Scam.* 41; *S. C.*, 36 *Am. Dec.* 511; *Hanna v. McKennie*, 5 *B. Mon.* 314; *S. C.*, 43 *Am. Dec.* 122.

A bond given in particular or partial restraint of trade is sometimes regarded as an exception to the rule concerning the effect of seals. Such a bond to be valid must be made upon a reasonable consideration, and if not it is invalid, notwithstanding the seal. "It is generally said that an agreement of this kind is the only exception to the rule that a contract under seal imports a consideration which a party is not permitted to deny. It might be as properly said that this is the only case in which a contract by specialty is unlawful and void merely because it is without actual consideration": *Metcalf on Contracts*, 233. And in the case of bonds of this character the consideration must appear upon the face, and a declaration on such a bond that sets forth no consideration is bad on demurrer: *Hutton v. Parker*, 7 *Dowl. P. C.* 739; see also *Malkan v. May*, 11 *Mees. & W.* 665; *Mitchell v. Reynolds*, 1 *P. Wms.* 181; *Wickens v. Evans*, 3 *Younge & J.* 329; *Lange v. Werk*, 2 *Ohio St.* 519.

In some few of the United States the common-law doctrine with respect

to seals still prevails, at least to some extent, and want of consideration is no defense to an action at law on a bond: *Guy v. McLean*, 1 Dev. 46; *Walker v. Walker*, 13 Ired. 335; *Parker v. Flora*, 63 N. C. 474; *Page v. Frufant*, 2 Mass. 159; *Van Valkenburgh v. Smith*, 60 Me. 97; *Mitchell v. Williamson*, 6 Md. 210; *Harris v. Harris*, 23 Gratt. 737; see *Davis v. Burton*, 3 Scam. 41; S. C., 36 Am. Dec. 511. But in most of the states the rule has been either judicially modified or changed by statutory enactment. In South Carolina the courts refused to adopt the common-law rule, and placing their decision on the ground of usage and expediency, permitted the equitable defense of a want or failure of consideration to be pleaded in an action at law on a bond: *Gray v. Handkinson*, 1 Bay, 278; *State v. Gaillard*, 2 Id. 11; *Thompson v. McCord*, 2 Id. 76; though sealing casts the onus of proving want of consideration upon the defendant: *Mallock v. Gibson*, 8 Rich. 437. So in Georgia a judicial modification of the common law obtains; and in that state, in an action upon a single bill or sealed note, the defense of a total failure of consideration is admitted, and the defense of a partial failure of consideration is allowed by statute: *Martin v. Barton Iron Works*, 35 Ga. 320. In Pennsylvania, there being no court of chancery, it was, at an early date, permitted, as a matter of necessity and to prevent a failure of justice, to prove mistake or want of consideration under the plea of payment in an action at law on a bond: *Swift v. Hawkins*, 1 Dall. 17; *Solomon v. Kimmel*, 5 Binn. 232.

In some states, statutes have been enacted which provide that in actions upon sealed instruments the seal shall be merely presumptive evidence of a sufficient consideration which may be rebutted to the same extent and in the same manner as if the instrument were not sealed: New York, 2 R. S. 406, sec. 77; Alabama, Rev. Code (1867), p. 526, sec. 2632; Michigan, 2 Comp. Laws (1871), p. 1710, sec. 90; Oregon, Gen. Laws (1872), p. 258, sec. 743; Texas, 1 Pasch. Dig., sec. 228; *Case v. Boughton*, 11 Wend. 106; *Craver v. Wilson*, 4 Abb. App. 374; *Giles v. Williams*, 3 Ala. 316; S. C., 37 Am. Dec. 692; *Withers v. Green*, 9 How. 213; *Smith v. Busby*, 15 Mo. 387; *Aller v. Aller*, 40 N. J. L. 446; while in many other states all distinction between sealed and unsealed instruments is abolished: California, Civ. Code, sec. 1629; Indiana, 2 R. S. (G. & H.), p. 180, sec. 273; Iowa, Rev. Code (1873), p. 383, secs. 2112-2114; Kansas, Gen. Stat. (1868), p. 183, secs. 6-8; Kentucky, 1 R. S. (Stanton's), p. 267, secs. 2, 3; Nebraska, Gen. Stat. (1871), secs. 1804, 1806; *Leonard v. Bates*, 1 Blackf. 172; *Mount Pleasant v. Hobart*, 25 Kan. 719; *Coyle v. Fowler*, 3 J. J. Marsh. 472; *McCarty v. Beach*, 10 Cal. 462; *Ortman v. Dixon*, 13 Id. 33, 36. A tendency is shown, however, to construe these statutes stringently. Thus the statute of Virginia which permits a plea of failure of consideration is held to refer to contracts originally founded on a valuable consideration, and not to contracts without a consideration: *Harris v. Harris*, 23 Gratt. 751; *Cunningham v. Smith*, 10 Id. 255; *Watkins v. Hopkins*, 13 Id. 743; and therefore, in debt on a bond, want of consideration cannot be pleaded, as such a defense cannot be made to a specialty either at common law or under the statute: *Harris v. Harris*, 23 Gratt. 737. So by statute in Kentucky, a defendant in an action on a specialty is permitted by special plea to impeach or go into the consideration in the same manner as if it had not been sealed; but this was held to apply to but two cases: the one where there is no consideration, and the other where there has been a total failure of consideration, and not to a case where there has been a partial failure of the consideration: *Peebles v. Stephens*, 1 Bibb, 500; see, however, *Martin v. Barton Iron Works*, 35 Ga. 320, and *supra*

But even under a statute which permits the plea of a want of consideration in an action on a sealed bond, a voluntary bond may be enforced, if it is shown that the intention of the obligor was that it should have its common-law effect, and should be enforceable, notwithstanding there was no valuable consideration. Thus the statutes of New Jersey allow fraud in the consideration of instruments under seal to be set up as a defense, and take away the conclusive evidence of a sufficient consideration heretofore accorded to a sealed writing, and makes it only presumptive evidence. "This," it was said, "does not reach the case of a voluntary agreement, where there was no consideration, and none intended by the parties. The statute establishes a new rule of evidence, by which the consideration of sealed instruments may be shown, but does not take from them the effect of establishing a contract expressing the intention of the parties, made with the most solemn authentication, which is not shown to be fraudulent or illegal. It could not have been in the mind of the legislature to make it impossible for parties to enter into such promises; and without a clear expression of the legislative will, not only as to the admissibility, but the effect of such evidence, such construction should not be given to this law. Even if it should be held that a consideration is required to uphold a deed, yet it might still be implied, where its purpose is not within the mischief which the statute was intended to remedy. It was certainly not the intention of the legislature to abolish all distinction between simple contracts and specialties, for in the last clause of the section they say that all instruments executed with a scroll shall be deemed sealed instruments. It is evident that they were to be continued with their former legal effect, except so far as they might be controlled by evidence affecting their intended consideration": *Per* Scudder, J., in *Aller v. Aller*, 40 N. J. L. 446; and it was accordingly held that a promise to pay money under seal, though voluntary, was still enforceable, as the intention to make a gift was proved. The action, however, was brought after the death of the obligor.

In equity, however, a seal is not sufficient to show a consideration, and the consideration of an instrument may be impeached notwithstanding a seal is affixed thereto: *Jefferys v. Jefferys*, Craig & P. 138; *Hervey v. Audland*, 14 Sim. 531; *Meek v. Kettlewell*, 1 Phillim. 342; S. C., 1 Hare, 464; *Ord v. Johnson*, 1 Jur., N. S., 1063; *Wycherley v. Wycherley*, 2 Eden, 177; *Kekewich v. Manning*, 1 DeGex, M. & G. 176; *Jones v. Lock*, L. R. 1 Ch. 25; *Estate of Webb*, 49 Cal. 541, 545; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Wason v. Colburn*, 99 Mass. 342; *Vasser v. Vasser*, 23 Miss. 378; *Minturn v. Seymour*, 4 Johns. Ch. 497; *Burling v. King*, 66 Barb. 633; *Pomeroy on Specific Performance*, sec. 57, notes 2 and 3. Therefore, although, since a bond under seal for the payment of money is enforceable at law only, equity will not interfere or grant any remedy thereon, yet when the obligee comes into equity for the enforcement or specific performance of a bond under seal the chancellor will permit the consideration to be looked into, and if there is no consideration, or a failure of consideration, a court of chancery will award no relief; for equity disregards mere form, and "looking at the reality always requires an actual consideration, and permits the want of it to be shown, notwithstanding the seal, and applies this doctrine to covenants, settlements, and executory agreements of every description": 1 *Pomeroy's Eq. Jur.*, sec. 363; *Ord v. Johnston*, 1 Jur., N. S., 1063, 1065; *Houghton v. Lees*, 1 Id. 862, 863; *Stone v. Hackett*, 12 Gray, 227; *Butman v. Porter*, 100 Mass. 337; *Murphy v. Rooney*, 45 Cal. 78, and cases cited *supra*.

CASE
IN THE
COURT OF ERRORS AND APPEALS
OF
DELAWARE.

PICKERING v. DAY.

[3 HOUSTON, 474.]

COLLECTOR OF INTERNAL REVENUE DISTRICT, UNDER ACT OF CONGRESS OF JULY 1, 1862, is the recognized agent of the government, and is responsible to the government and to individuals for all money collected and all acts done by his deputy collectors, who are the agents of the collector, and are responsible to him, and not to the government or individuals, and he may or may not, as he pleases, take security from the deputies for the faithful discharge of their duties.

MOLASSES MANUFACTURED FROM SORGHUM IS SUBJECT OF TAXATION, under the United States internal revenue acts of July 1, 1862, and June 30, 1864.

IT IS FRAUD ON SURETIES OF DEPUTY COLLECTOR OF INTERNAL REVENUE, and they are discharged from liability, if the collector consents to his using the public money in his private business of buying and speculating in grain, wherefrom a defalcation on his part results.

SWORN ANSWER OF DEFENDANT TO BILL IN EQUITY IS EVIDENCE in his favor equal in weight to the testimony of a single witness, and is not to be discredited, nor any presumption raised against it, by reason of its being the answer of an interested party; and the answer is sufficient in itself if direct and positive and responsive to the bill, to establish the denials and the affirmations of facts which it contains, if not outweighed by opposing proof.

TO OVERCOME ANSWER OF DEFENDANT TO BILL IN EQUITY, it is not indispensable in all cases to have the testimony of a witness with corroborative circumstances; because circumstances alone may sometimes be found in the answer itself, or in documentary evidence referred to in the answer sufficient to more than countervail the denials of the answer. The rule properly applies to the case of an answer opposed only by the testimony of a single witness.

WITNESS RELIED ON TO OVERCOME ANSWER TO BILL IN EQUITY must not only be competent, but his testimony must be credible; and the circumstances depended upon as corroborative must be such as to materially

support the witness and strengthen his testimony, so that when both are considered together, they may be sufficient to satisfy the conscience of the court that the allegations and charges of the bill are true.

ANSWER TO BILL OUGHT NOT TO BE OVERTHROWN by evidence less positive than the allegations and denials of the answer, nor should it be outweighed by proof of circumstances which may be reconciled with the truth of the statements therein contained.

COURT MUST GIVE TO LANGUAGE OF STATUTE, WHICH IS DEFICIENT IN PRECISION and clearness, and faulty or imperfect in phraseology or structure, such an interpretation as may appear best adapted to effectuate the object contemplated in its enactment; and it is always to be presumed, in such case, that the legislature intended that the most reasonable and beneficial interpretation should be given to the language which they have used.

WHERE LANGUAGE OF STATUTE IS NOT CLEAR, and it is obvious that by a particular construction great public interests would be endangered or sacrificed, the court ought not to presume that such construction was intended by the makers of the law.

OFFICES OF COLLECTOR AND DEPUTY COLLECTOR OF INTERNAL REVENUE, as created by the act of Congress of July 1, 1862, are continued under the act of June 30, 1864, by virtue of the saving clauses of that act, which exclude from the operation of the repealing clause the provisions of the former statute creating the offices; and the bonds given by such officers in qualifying under the former act are continued in full force and effect under the latter act, and it was not necessary for either of them to give a new bond after the passage of the latter act.

GIVING OF BOND BY COLLECTOR OF INTERNAL REVENUE IS NOT CONDITION PRECEDENT to his authority to exercise the powers and perform the duties of his office under either act of Congress relative to the collection of internal revenue; but the provision in question is merely directory to the proper officer of the treasury department, and a bond may be required or waived at his discretion. It is intended solely for the security of the government, and constitutes no part of the contract of the sureties of the deputy collector, and his not giving a bond can in no way affect their responsibility.

CONCEALMENT MEANS, IN EQUITY, CONCEALMENT OF THOSE MATERIAL FACTS AND CIRCUMSTANCES which one party to the contract is under a legal or equitable obligation to make known to the other, and which the latter, of right and by law, is entitled to have communicated to him.

TO RELIEVE SURETY ON OFFICIAL BOND FROM LIABILITY on the ground that the obligee has concealed a defalcation on the part of the principal, the concealment must be active or industrious, and therefore fraudulent in its character. Mere passiveness on the part of the creditor in not enforcing his remedy will not of itself discharge the surety; nor will failure or neglect to give notice to the surety of the principal's defalcation have that effect.

SURETIES ON BOND OF DEPUTY COLLECTOR OF INTERNAL REVENUE are not relieved from liability because of the collector's failure to discharge him immediately upon the discovery of his defalcation, especially where the sureties suffered no detriment by his continuance in office. Nothing less than fraud, actual or constructive, on the part of the collector could relieve them from their responsibility.

GENERAL DOCTRINE THAT CONTRACT OF SURETY SHOULD BE STRICTLY CONSTRUED is conceded, if by "strictly" is meant that his liability shall not, by implication, be extended beyond the fair scope of the terms of his contract.

BOND OF DEPUTY COLLECTOR OF INTERNAL REVENUE, executed before the passage of the internal revenue act of June 30, 1864, covered all taxes assessed and collected under the previous act of July 1, 1862, whether the same were collected before or after the act of June 30, 1864; and whether it extended to taxes collected under the latter act is a question not material in this case as between the sureties and the obligee of the bond, since the sureties on this bond, and those on a bond executed after the passage of the latter act, have themselves settled the matter of the appropriation of the payments to be made, by their indorsements on the bonds of the sums agreed upon, and have provided, by their concurrent agreement, for the final adjustment of their respective liabilities upon them.

DEBTOR MAY APPROPRIATE PAYMENT TO WHICH DEBT HE PLEASES, if he makes the appropriation at the time he makes the payment, for he cannot do so afterwards; but if no specific appropriation be made by the debtor at the time of payment, then the right of appropriation is devolved upon the creditor, and he may make it in any way he may think proper, and at any time before an account is settled between them, or before action brought; provided that such appropriation is not manifestly inequitable in respect to third persons.

IF NO APPROPRIATION BE MADE BY EITHER DEBTOR OR CREDITOR, the payment must be applied as the law directs.

WHERE THERE IS SINGLE RUNNING ACCOUNT IN WHICH THIRD PERSONS ARE NOT INTERESTED, and neither debtor nor creditor makes the appropriation, the law will apply the payment to the discharge of the several items of the account in the order of their priority, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side of it.

WHERE THERE ARE INTERVENING EQUITIES IN FAVOR OF THIRD PERSONS, the law will apply the payments according to its own notion of the intrinsic justice and equity of the case.

WHERE PUBLIC OFFICER HAS GIVEN DIFFERENT BONDS, AT DIFFERENT TIMES, WITH DIFFERENT SURETIES, his payments must be so appropriated as to give each bond credit for the money respectively due, collected, and paid under it.

BILL in equity by Thomas Pickering against Charles B. Day, and William Whitaker, sheriff. Day was the collector of internal revenue for the district and state of Delaware, and appointed one John F. Clements his deputy; and the latter executed to Day a bond in the sum of ten thousand dollars for the faithful performance of his duties with the complainant and others as his sureties. Clements failed to pay over moneys collected by him, and Day had caused a judgment to be entered on the bond against the complainant and his co-sureties, and execution to be issued thereon which had been levied upon goods and chattels of the complainant. The bill

prayed for an account between Day and Clements, and for an injunction perpetually restraining Day and the sheriff from proceeding to sell the goods of the complainant on the execution, and that the judgment entered in favor of Day be decreed to be vacated, annulled, and set aside. Upon the hearing the court dissolved the injunction previously issued and dismissed the bill. In other respects the opinion states the case.

Eli Saulebury and Comegys, for the appellant.

Smithers, for the respondents.

By Court, GILPIN, C. J. The second section of the act of Congress of July 1, 1862, entitled "An act to provide internal revenue to support the government and to pay the interest on the public debt," authorized the President of the United States to appoint collectors of internal revenue, for the several collection districts into which the states, territories, and the District of Columbia should be divided. The fourth section of the act declares that before any such collector shall enter upon the duties of his office, he shall execute a bond, for such amount as shall be prescribed by the commissioner of internal revenue under the direction of the Secretary of the Treasury, with not less than five sureties, to be approved as sufficient, by the solicitor of the treasury,—containing the condition, etc. By the fifth section of the act, each collector is authorized to appoint, by an instrument of writing under his hand, as many deputies as he may think proper; and may require bonds or other securities, and accept the same from such deputy; and each of such deputies is invested with the like authority in every respect, to collect the duties and taxes levied or assessed within the portion of the district assigned to him, which is by the act vested in the collector himself. And here it may not be amiss to remark that while this section expressly provides that the collector shall in every respect be responsible, both to the United States and to individuals, as the case may be, for all money collected and for every act done as deputy collector by any of his deputies whilst acting as such, and for every omission, it does not in any event whatever make the deputy responsible, either to the government or to individuals, for his own faithfulness, or for the manner in which he shall perform his duties. The collector is the recognized agent of the government, and is made responsible to the government;

the deputy is the agent of the collector, and is made responsible to him, and not to the government, and he may take security or not, as he pleases. We do not deem it material to consider at much length the question raised by the bill in regard to the money collected from divisions Nos. 9 and 10, and which it is contended should be credited in reduction of the amount indorsed on the bonds, as being due from Clements to Day on the 10th of August, 1865; because we think it is satisfactorily shown by the answer and by the testimony of Clements himself, the witness of the complainant, that all the money collected by Clements from these divisions during the time he was deputy collector of No. 9, and paid over to the defendant, have been properly applied by the latter, and that the same constitutes no part of the sum of \$11,520.57, which is divided between and indorsed on the bonds, as the amount of defalcation. Nor do we consider it necessary to advert to the checks of April 29, 1864, and February 7, 1865, which are claimed as additional credits in reduction of the said sum of \$11,520.57, further than to say that it satisfactorily appears from the answer, and from the testimony of Bateman, Prouse, and M. Day, that the first was given in satisfaction of a note due William L. Hansel & Co., then in the defendant's hands for collection, and that the second was given in reimbursement of money loaned by the defendant to Clements on his private account. The testimony of Clements on this point is very weak and uncertain; at most, it amounts but to an impression or belief on his part. The answer, on the contrary, is direct and positive, and is supported by the evidence of defendant's witnesses. After a careful examination of the acts of Congress upon the subject of internal revenue, we are of opinion that molasses manufactured from sorghum was a subject of taxation under section 75 of the act of July 1, 1862, and under section 94 of the act of June 30, 1864; under the former of three per cent *ad valorem*, and under the latter of five per cent *ad valorem*. We think it comes within the meaning of the terms "or of other materials," to be found in the paragraphs commencing with the words "on all manufactures of cotton, wool, silk, worsted, flax," etc. The language of both paragraphs is the same. It is quite unnecessary to state the process of reasoning by which we have arrived at this conclusion.

Having thus briefly disposed of these several matters, we will now consider the more important questions presented by the case, and which the counsel on both sides have discussed with

so much ability. The defendant, Charles H. B. Day, was appointed and commissioned collector of internal revenue for the collection district of the state of Delaware, on the 4th of March, 1863, to hold the office during the pleasure of the President. He gave bond of that date to the United States, according to the requirements of the fourth section of the act of July 1, 1862. On the 1st of October, 1863, he redistricted the state, reducing the number from twelve to six divisions, two for each county; and on the same day he appointed John F. Clements deputy collector for division No. 4, comprising the hundreds of Murderkill, Milford, and Mispillion, in Kent County. Some days afterward, but prior to the 20th of October, 1863, Clements, as deputy collector of division No. 4, with James R. Clements, William Smith, James Green, and Thomas Pickering as his sureties, executed and delivered to Day, as collector of internal revenue, a bond in the penal sum of ten thousand dollars, conditioned in substance for the faithful and diligent collection of all rates and taxes which should be committed to him for collection, and to pay over the same at such times and in such manner and form as the said Day should prescribe and direct. On the 13th of October, 1864, Clements, as deputy collector of division No. 4, with James R. Clements and Daniel McBride as his sureties, executed and delivered to the defendant, as collector of internal revenue, another bond in the penal sum of five thousand dollars, with like condition as that annexed or underwritten to the said bond for ten thousand dollars. The object or purpose of both bonds was the same, the protection and indemnification of the defendant against all loss and damage to which he might become liable, by reason of the default or misconduct of Clements as deputy collector of division No. 4, the sureties taking upon themselves the responsibility of guaranteeing the faithfulness of Clements in collecting and paying over all the public money which should come to his hands as such deputy. Shortly after the execution of the bond of October, 1863, Clements entered upon the duties of his office as deputy collector of division No. 4, and continued therein until the 15th of July, 1865, when he was removed, it appearing, according to the accounts, that he was a defaulter on the 1st of July, 1865, to the amount of \$11,520.57. It is stated in the answer that this sum was somewhat increased by the subsequent discovery of additional items of indebtedness. This sum, however, was assumed on the 10th of August, 1865, by all the parties interested to be the actual

amount of Clements's indebtedness, and he and his sureties in both bonds on that day entered into an agreement with the defendant to apportion and divide that sum between the two bonds, according to the same proportion which the penal sums mentioned in the bonds respectively bore to each other, by which agreement written on the said bonds, and executed under the hands and seals of Clements and his sureties, the sum of \$7,680.38 is ascertained and declared to be the true amount due on the bond of October, 1863, with interest from June 30, 1865, and the sum of \$3,840.19 is ascertained and declared to be the true amount due on the bond of October 13, 1864, with interest from June 30, 1865. At the same time the sureties between themselves executed another agreement, to which, as constituting a part of one general arrangement in regard to their respective liabilities, we may hereafter have occasion to refer.

The question which we now propose to consider is, whether the defendant, Day, consented to Clements's using the public money in his private business of buying and speculating in grain. The bill, on information derived from Clements, charges that he did consent to such use of it. If this be true, it was a fraud on the sureties, and discharges them from their liability. But the answer, on the contrary, denies the charge directly and positively, wherever made, insinuated, or suggested in the bill. The language of the defendant is, that he "utterly denies that he ever did, directly or indirectly, assent, consent, or agree to the use of any such money by the said John F. Clements, or John F. Clements and William S. Prouse, trading as John F. Clements & Co., or by any other person whatsoever"; and he avers that he had no information or suspicion that the money was so used or employed until about the first day of February, 1865, when, upon balancing his accounts as of the 1st of January then next preceding, it was discovered that he was a defaulter. As the answer of a defendant is a formal and deliberate statement, it is evidence against him; and when made under oath, as is usually the case, it is evidence of the most conclusive character. But whilst this is so, it is nevertheless equally true that his sworn answer is also evidence in his favor, equal in weight to the testimony of a single witness, and is not to be discredited, nor any presumption raised against it, by reason of its being the answer of an interested party. And the answer is sufficient in itself, if direct and positive, and responsive to the bill, to establish the denials and the affirmations of facts

which it contains, if not outweighed by opposing proof: *Allen v. Mower*, 17 Vt. 61; *Powell v. Powell*, 7 Ala. 582; *Schwarz v. Wendell*, Walk. Ch. 241; *Woodcock v. Bennet*, 1 Cow. 711 [13 Am. Dec. 568]; 3 Greenl. Ev., sec. 285. And this is so, because the complainant, having seen fit to make the defendant answer under oath, has substantially made him his witness; and it would be unreasonable and unjust, after compelling him to testify, to treat his testimony as entitled to no credit. His oath is, therefore, deemed to be equal to the oath of a credible witness; and the complainant is bound by his answers, unless they are satisfactorily disproved: *Clason v. Morris*, 10 Johns. 542. The well-established rule in courts of equity in regard to the denials of a defendant, as stated in 3 Greenl. Ev., sec. 289, and which may be said, with some slight qualification, to embody the result of the decisions on this point, is, "that an answer which is responsive to the allegations and charges of the bill, and contains clear and positive denials thereof, must prevail, unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness and other attendant circumstances which supply the want of another witness, and thus destroy the statements of the answer, or demonstrate its incredibility or insufficiency as evidence." The true meaning of the rule, however, is not that the testimony of a witness, with additional and corroborative circumstances, is indispensable in all cases; because circumstances alone may sometimes be found in the answer itself, or in documentary evidence referred to in the answer, sufficient to more than countervail the denials of the answer. The rule properly applies to the case of an answer opposed only by the testimony of a single witness.

Now, if this case stood alone on the bill and answer, or on the bill, answer, and the testimony of a single witness, it would be perfectly obvious that the complainant had not made out a case upon which he could stand in a court of equity. For it is certainly well settled, as we have seen, that where the allegations and charges in the bill as grounds for obtaining a decree are clearly and positively denied by the answer, and proved by only a single witness, the court will not decree against the defendant. But on the other hand, it is equally well settled that where the witness on the part of the complainant sustains the allegations and charges of the bill, and his testimony is supported by corroborative circumstances,

the denials of the answer will be overborne, and the complainant will consequently be entitled to a decree. But in order to have this effect, What must be the character of the witness and his testimony? And what the nature of the corroborative circumstances? We answer that the witness must not only be competent, but his testimony must be credible, and the circumstances relied on as corroborative must be such as to materially support the witness, and strengthen his testimony, so that when both are considered together they may be sufficient to satisfy the conscience of the court that the allegations and charges of the bill, in respect to the point in controversy, are true. And it has been held that if the answer be positive, denying the charges in the bill, it ought not to be overthrown by evidence less positive, though it proceed from the mouth of two witnesses: *Auditor v. Johnson*, 1 Hen. & M. 536. Nor should such answer be considered outweighed by mere proof of facts or circumstances which may be reconciled with the truth of statements contained in the answer: *Branch Bank v. Marshall*, 4 Ala. 60.

Now, the first general observation which we have to make in regard to the witness Clements, and his testimony, is, that he appears to be a person of uncertain and imperfect recollection. He does not recollect many things which would have impressed themselves upon most men's minds, and which from their nature and importance he ought to have remembered. One would suppose that a person situated as he was would have a vivid recollection of all that was said, and of all that occurred in relation to this subject; and yet he does not remember the respective amounts for which his bonds were given. He says two of them were for ten thousand dollars each, and one for five thousand dollars; and he thinks the five-thousand-dollar one was given for stamps, and that Green and Pickering were on all the bonds. Now, we know that these things are not so. He is also strangely oblivious of almost everything that was said or done on the 10th of August, 1865, at the interview and arrangement which took place at the collector's office, although he was present during the whole time. He says he remembers that whilst deputy collector of No. 9, he told Day that unless he allowed him to use the public money he would resign; and yet he does not know nor remember Day's reply, but says he did not object. He next says his impression is, he gave his consent, and subsequently he becomes very sure he gave his consent; and lastly, he avers

that he did consent on the occasion of Mrs. Wilson's funeral; but he does not recollect the month when this took place, or whether it occurred in 1863 or in 1864. His answers to the interrogatories propounded to him in this regard are hesitating, limping answers. And as a whole, his testimony is defective, obscure, uncertain, doubtful, and unsatisfactory. Moreover, he is discredited by John H. Bateman and Matthias Day.

Then as to the corroborative circumstances: it is alleged and proved, and admitted by the answer, that the defendant was frequently paid by drafts of the firm drawn by Clements on their factors in Philadelphia and New York; and it is insisted that this shows that Day consented to the use of the public money by Clements in his grain business. It appears by the bill of the complainant that at the time of the appointment of Clements as deputy collector, he was already extensively engaged in association with William S. Prouse in the business of buying and selling grain, and speculating in the purchase and sale thereof. And it appears from other sources that his house was in good standing and fair credit, and that their drafts were always honored and paid at maturity. There is no suggestion in the bill that either Clements or his house had been at any time prior to the discovery of his defalcation in 1865 in embarrassed circumstances. According to the allegations of the bill, he was conducting an extensive business, and it seems that his credit was good. It does not appear from any evidence in the cause that he extended his business after his appointment. It would seem, therefore, whatever may have been the real fact, that there was no necessity for his using the public money in his business. If he could carry on an extensive business on the means and credit of his firm before his appointment, why could he not do so after his appointment? There is no evidence tending to show that the defendant knew or suspected that he had made any losses. Why, then, should he suspect that Clements was abusing his trust? How, then, can we say under such circumstances that the receiving of these drafts in payment of taxes collected by his deputy shows that the defendant consented to the use of the public money in Clements's grain business? The defendant admits in his answer that he received the drafts in payment of taxes collected; but he states at the same time, in response to the allegations of the bill, the circumstances under which, and the reasons why, he received

them. And we think that the fact that he did so receive them is reconcilable with the denials and averments of the answer. We therefore fully agree with the chancellor on this point, that the answer must prevail.

The next question which we propose to consider is, whether the complainant and his co-sureties were discharged from their liability under the bond for ten thousand dollars, executed and delivered in the month of October, 1863, by reason of the act of Congress of June 30, 1864, entitled "An act to provide internal revenue to support the government, pay interest on the public debt, and for other purposes." By section 173 of the last-mentioned act, the internal revenue act of July 1, 1862, is declared to be repealed, "except sections 115 and 119 thereof, and excepting, further, all provisions of said act which create the offices of commissioner of internal revenue, assessor, assistant assessor, collector, deputy collector, and inspector, and provide for the appointment and qualification of said officers." And after repealing other acts and parts of acts, there is the further exception, in the form of a proviso, that the provisions of said acts shall be in force for levying and collecting all taxes, duties, and licenses properly assessed, or liable to be assessed, or accruing under former acts, or drawbacks, the right to which had already accrued, or might thereafter accrue, under said acts; and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof, and for carrying out and completing all proceedings which had been already commenced, or that might be commenced to enforce such fines, penalties, and forfeitures, or criminal proceedings under said acts, and for the punishment of crimes of which any party should be or had been found guilty. And as if to shut out all question or doubt as to who should exercise the powers and perform the duties referred to in the savings of the act, it is further provided "that no office created by the said acts, and continued by this act, shall be vacated by reason of any provisions herein contained, but the officers heretofore appointed shall continue to hold the said offices, without reappointment." Now, our duty is to ascertain, if possible, what Congress meant by these saving clauses. They are perhaps deficient in precision and clearness, but however faulty or imperfect in phraseology or structure, we are bound to give to them such an interpretation as may appear best adapted to effectuate the object contemplated by Congress. When the

design of the legislature is not clearly apparent, it is always to be presumed they intended that the most reasonable and beneficial interpretation should be given to the language which they have used. If the language is clear, and the intent manifest, there is, of course, no room for presumptions. But if, on the other hand, the language is not clear, and it is obvious that by a particular construction in a doubtful case great public interests would be endangered or sacrificed, the court ought not to presume that such construction was intended by the makers of the law. Now, remembering that the intention of Congress, if it can be ascertained, is to govern, and that a thing which is within the meaning of the makers of the law is as much within the law as if it were within the letter, and applying the rules of construction which we have suggested to the savings of the section 173, and to the declaratory clause contained in the second proviso thereof, we think it is not difficult to give a reasonable and safe, as well as beneficial, construction to the clauses under consideration.

The learned counsel for the complainant insist that immediately upon the passing of the act of June 30, 1864, the office of collector created by the act of July 1, 1862, ceased to exist; and that the defendant and his bond, being thus rendered *functus officio*, the sureties of his deputy, Clements, who gave bond under the act of July 1, 1862, were discharged from liability. And assuming, as they do, that the defendant no longer held the office which he had prior to June 30, 1864, or that if he was in office, it was a new office, with new duties and responsibilities, by force of the act of June 30, 1864, the ninth section of which required him to give a new bond before entering upon the duties of his office, they insist that, as he had not given such new bond, he was not legally competent to appoint a deputy, or to take a bond from him, and that therefore the bond of the 13th of October, 1864, for five thousand dollars, is a mere nullity. Are these positions of the counsel tenable? We think they are not. It seems to us that the manifest design of Congress was to prevent any break, suspension, or interruption in the collection of internal revenue, by preserving and continuing in active operation all the old instrumentalities which had been provided for that purpose. We consider that the provisions of the act of July 1, 1862, which create the offices of collector and deputy collector, and provide for their appointment and qualification, namely, the second, fourth, and fifth sections, are, by the exception or sav-

ing, taken out of and excluded from the operation of the repealing clause; and that these sections remain unrepealed and in full force; and that the defendant and his deputy, Clements, continued to hold their respective offices by force of their appointment under these unrepealed sections. And we consider that the defendant's bond, and also Clements's bond of October, 1863, remain in full force, in so far, at least, as respects the taxes and duties assessed and levied under and according to the rates prescribed by the act of July 1, 1862. We do not mean, however, to be understood as saying that the obligation of either bond is necessarily limited to the taxes and duties collected under that act. For as the appointments were indefinite and without limitation as to time, and as the bonds are for the faithful performance of the duties of their offices, according to the conditions thereof, and as it would seem that the responsibility of the sureties is co-extensive with that of the principal, it might perhaps be justly holden that the responsibility of both principal and sureties under their bond would continue so long as the principal's employments under their appointments continued. But it is not necessary to decide this question, and we therefore express no opinion on it. As regards the collector and his deputy continuing to hold their offices, we think the result would have been the same without the provision contained in the second proviso of section 173, which provision seems to us to partake more of the character of a declaratory law than anything else. It does not create any office nor appoint any officer. It speaks of offices already "created" by other acts of Congress, "and continued by this act." But how continued by this act? Continued, we answer, by being excepted, and thus taken out of and excluded from the operation of the repealing clause. It declares that these offices shall not be vacated by reason of any provision contained in the act. It speaks of officers "heretofore appointed," and declares they shall continue to hold "the said offices," meaning the offices which were created by prior acts, and which they already held prior to the act of June 30, 1864.

Another question which we have been called on to consider is, whether the defendant who had given bond under the act of July 1, 1862, was under any legal necessity of giving a new bond after the passing of the act of June, 1864? If, according to our theory, he was already in office under the former act, had already given bond, and entered upon the duties of

his office, and had been continued in said office by reason of the savings just referred to, then it would seem to follow that it could not have been the intention of Congress that the ninth section of the act of June 30, 1864, should apply to his case, or to any such case; but rather that it was intended to apply only to future appointments. It is true, the secretary could have required him to give a new bond; for under both acts, collectors are required to renew, strengthen, and increase their bonds whenever directed by the Secretary of the Treasury to do so. But let us extend the inquiry. Is the giving of a bond by the appointee made by either act a condition precedent to his authority to exercise the powers and perform the duties of a collector of internal revenue? Let us see. It is true, he is to execute a bond for such amount as shall be prescribed by the commissioner of internal revenue under the direction of the Secretary of the Treasury. But here something is to be done by the commissioner before the bond can be executed. The commissioner is first to prescribe the amount, and if this be done, then the collector can give the bond. Can he give it before the amount is prescribed? But suppose the commissioner from any cause should fail to prescribe the amount, should the collector be considered in default, and thus rendered incapable of exercising his proper official functions, because he has not done that which he could not do until the amount of the bond had been prescribed by that officer? We have not urged the argument of inconvenience, because it is only where there are serious doubts as to the proper construction of the statute that such arguments are entitled to much weight. But after giving full consideration to the argument which has been urged with so much earnestness on behalf of the complainant, we are constrained to differ from his counsel, and to say that we do not consider the giving of a bond a condition precedent to the collector's entering upon the discharge of the duties of his office. On the contrary, we think the fair and reasonable interpretation of the provision in question is, that it is merely directory to the proper officer of the treasury department, and that the execution of the bond may be either required or waived, according to his discretion. The bond, we know, is intended solely for the security and benefit of the government, and we are unable to see how it can constitute any part of the contract of Clements or his sureties, or how the giving or not giving of it can in any way affect their responsibility. The

bond of the defendant to the government, and the bond of Clements to Day, constitute distinct and independent contracts, and impose on the parties respectively distinct and independent obligations. In conclusion, on this point, we think this doctrine is fully sustained by the cases of *United States v. Vanzandt*, 11 Wheat. 190; *Bank of United States v. Dandridge*, 12 Id. 64; *United States v. Bradley*, 10 Pet. 364; *Bowman v. Barnard*, 24 Vt. 355; *Boreland v. Washington County*, 20 Pa. St. 151. And if this be so, then we are justified upon principle as well as authority in saying that the defendant's authority as collector did not depend upon his giving bond; on the contrary, that he derived his official authority from his appointment and the acts of Congress defining his powers and duties, and that his appointment as collector was complete and valid for all purposes when confirmed by the Senate.

Again the complainant claims to be discharged on the ground of misrepresentation and concealment, on the part of the defendant, of material facts, and of the true state of affairs between him and Clements, which he was bound in good faith to disclose truly to him and his co-sureties; and he also contends that if not absolutely discharged from liability, still, that the concealment of material facts by the defendant at and before the time of the arrangement of August 10, 1865, and which, if made known to the sureties, would have prevented that arrangement, affords at least sufficient grounds to justify the court in canceling the indorsements on the bonds, and thus to open the question of appropriation of payments, so that that question may be finally settled by this court according to the rules of law. Concealment, in the sense in which this term is understood in courts of equity, means the concealment of those material facts and circumstances which one party to the contract is under a legal or equitable obligation to make known to the other, and which the latter, of right and by law, is entitled to have communicated to him: 1 Story's Eq. Jur., sec. 207. And that as touching the liability of a surety, where there has been a defalcation on the part of the principal, the concealment of the fact must be active or industrious, and therefore fraudulent in its character: *Shepherd v. Beecher*, 2 P. Wms. 288; *Peel v. Tatlock*, 1 Bos. & P. 419; *Kent Navigation Co. v. Harley*, 10 East, 34; *Goring v. Edmonds*, 6 Bing. 94, 98; *Eyre v. Everett*, 2 Russ. 381; *Wright v. Simpson*, 6 Ves. 734; *Orme v. Young*, 1 Holt, 84; 2 Lead. Cas. Eq., pt. 2,

Am. notes, 362. To be available as matter of defense, there must be an undue concealment, or *supressio veri*, to the injury or prejudice of the surety; for it is not every concealment, even of material facts, that will discharge him. To have this effect, the concealment must be injurious, and must fall within some definition of fraud. Mere passiveness on the part of the creditor in not enforcing his remedy will not of itself discharge the surety; nor will failure or neglect to give notice to the surety of the principal's defalcation have that effect. The creditor, under such circumstances, is not bound to anticipate inquiry by disclosure: *Hamilton v. Watson*, 12 Clark & F. 109; *North British Ins. Co. v. Lloyd*, 10 Ex. 523; *Stewart v. McKean*, 10 Id. 675. In the case of *Wright v. Simpson*, *supra*, Lord Eldon says, as to the case of principal and surety: "I never understood that, as between the obligee and the surety, there was any obligation of active diligence against the principal. If the obligee begins to sue the principal and afterward gives time, the surety has the benefit of it. But the surety is a guarantor, and it is his business to see whether the principal pays, and not that of the creditor." Now, what material facts has the defendant concealed to the injury of the complainant and his co-sureties? We have already decided that the charge of consenting to the use of the money in the grain business not having been made out to our satisfaction, the denials of the answer in regard to it must prevail. We have also decided that the giving of a new bond was not a condition precedent to the collector's entering on the duties of his office. These matters, therefore, are out of the way. But it is charged that the defendant misrepresented to the complainant the state of affairs between himself and Clements. The charge is not sustained by proof, and it is denied by the answer.

Again, it is contended that, in consequence of a want of knowledge of facts which it was the duty of the defendant to have communicated to them, the complainant and his co-sureties were surprised into the execution of the indorsements on the bonds, and that the same were made under a misapprehension of their rights, and without due deliberation; and therefore the indorsements should be canceled. We do not so understand the case. It is a well-known maxim that ignorance of the law excuses no one; it cannot, therefore, constitute a ground for setting aside or reforming a written agreement. Ignorance of fact may. *Ignorantia facti excusat*. But a court of equity will not grant relief in

cases of written instruments, unless there is a plain mistake clearly made out by satisfactory proofs: 1 Story's Eq. Jur., sec. 157. It seems to us that all the parties that met at the defendant's office on the 10th of August, 1865, understood perfectly well what they were about. They knew Clements was a defaulter; they knew the amount; the books and accounts were there open to their inspection. They went there by appointment, for the express purpose of arranging this very matter in some way or other. The bonds were there, and they discussed the question of whether the second bond was in addition to or superseded the first bond; they discussed their respective liabilities under these several bonds, and they entered into an agreement among themselves to refer the question of their respective liabilities, as between themselves, to arbitrators. They considered the expediency of protecting themselves by taking an assignment from Clements; and they urged the defendant to issue execution against Clements, which he refused to do, unless they first made the indorsements on the bonds, ascertaining the respective amounts due thereon. They remained there discussing and deliberating on these matters for a period of six hours and upward. But they say they wished execution issued against Clements, which the defendant refused to issue unless they, the sureties, would first make the indorsements on the bonds, and supposing from the defendant's declarations that no execution could be issued until the indorsements were made on them, they agreed to make them. The defendant admits in his answer that he did refuse; but he assigns a reason for it. And we think he had a perfect right under the circumstances to refuse without assigning any reason; because the law accorded to him the right to remain passive, or to proceed against Clements, or against the sureties, or against both, at his option. After fully considering the subject, we think the complainant has failed to show any undue concealment on the part of the defendant, or that the sureties were taken by surprise or were misled. On the contrary, we think it manifest from the evidence that the complainant and his co-sureties were fully cognizant of all the facts really affecting their interests, which it was at all material for them to know, and that in executing the agreements indorsed on the bonds they acted advisedly and with due deliberation. We therefore consider that the chancellor did right in refusing to disturb the said agreements.

And here we might close the case. Because we consider that

as between the defendant and the sureties, the indorsements on the bonds amounted to an appropriation by the sureties themselves, of the payments made by Clements, — an appropriation just in itself toward the defendant, and which cannot in the end operate unjustly toward any of the sureties, since they have taken the wise precaution of providing by a special agreement for the equitable adjustment of their respective liabilities as between themselves. But it is said that the defendant should have discharged Clements immediately on the discovery of his defalcations, and that having failed to do so, the sureties were thereby discharged from their liability on the bond. We do not think so. We know of no decision or rule of law requiring the defendant to discharge Clements on discovering his defalcation. They guaranteed his faithfulness and honesty in the discharge of his duties. The bond was given for the express purpose of protecting the defendant against the consequences of his defalcation. Their contract was essentially a pledging of themselves and their estates to make good any and every misfeasance or non-feasance of their principal, during the whole time he should hold the office, to the extent of the penalty of the bond. It was no part of the contract that the defendant should discharge him immediately upon his failure to pay over the money in his hands. Moreover, the sureties suffered no detriment by his continuance in office; in fact, they were benefited. He reduced the amount of his indebtedness. Nothing less than fraud, actual or constructive, on the part of the defendant, could relieve them from their responsibility: *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Vanzandt*, 11 Id. 184; *Sailly v. Elmore*, 2 Paige, 500; *McLemore v. Powell*, 12 Wheat. 554. We freely concede the correctness of the general doctrine that the contract of a surety should be construed strictly, if by strictly is meant that the liability of a surety shall not by implication be extended beyond the fair scope of the terms of his contract. Indeed, the doctrine is so obviously founded in reason as to need no authority to support it. But at the same time that we say this, we confess our inability to comprehend how the doctrine can affect the right of the defendant to recover under the ten-thousand-dollar bond. There can be no doubt of the existence of a defalcation on the part of Clements to the extent of \$11,520.57 and upward. There can be as little doubt that this defalcation extended to both bonds, and that the penalties of both bonds were forfeited. There can, we think, be no shadow

of question that the bond for ten thousand dollars extended to and covered all taxes assessed and collected under the act of July 1, 1862, whether the same were collected before or after the act of June 30, 1864. But whether that bond can be held to extend to taxes assessed and collected under the act of June 30, 1864, is a question which we do not think it material for us to consider in this case. Nor have we deemed it necessary to go into a critical examination of the accounts to ascertain the exact amount due on each bond, because, as already stated, we consider that, as between the defendant and the sureties, the sureties themselves have settled the matter of appropriation by their indorsements on the bonds, and have provided by their concurrent agreement for the final adjustment of their respective liabilities upon them. Still, we may say that it seems to us, after a cursory examination of the accounts, that the amount of defalcation for taxes assessed under the act of July 1, 1862, will be found to be not very far from the sum indorsed by the sureties as being due on the ten-thousand-dollar bond. But inasmuch as all the authorities bearing on the question of the appropriation of payments have been cited, and the question itself has been elaborately discussed, and as the counsel for the complainant have earnestly contended that the apportionment of the defalcation between the two bonds, as thereon indorsed, is unjust and contrary to the settled rules of law respecting the appropriation of payments, it is perhaps proper that we should state, at least briefly, what we understand to be the present state of the law on this question.

The general rules upon the subject are these: If there be several debts due from a person, and he pays money to his creditor, the debtor has a right to appropriate the payment to which debt he pleases. But he must make the appropriation at the time he makes the payment; and he cannot make it afterward. If no specific appropriation be made by the debtor at the time of payment, then the right of appropriation is devolved upon the creditor; and he may make it in any way he may think proper, and at any time before an account is settled between them, or before action brought; provided that such appropriation is not manifestly inequitable in respect to third persons. It is true, the decisions are conflicting as to the time when the creditor must make the appropriation; but the rule as just stated may now be considered as settled by the weight of authority, both in England and in this country:

Simson v. Ingham, 2 Barn. & C. 65; *Philpot v. Jones*, 2 Ad. & E. 41; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Bosanquet v. Wray*, 6 Taunt. 597; *Mayor of Alexandria v. Patton*, 4 Cranch, 320; *Fields v. Holland*, 6 Id. 27; *Stone v. Seymour*, 15 Wend. 19; *United States v. Jones*, 7 How. 689. If no appropriation be made by either party, then the payment must be applied as the law directs. Mr. Justice Story, in *United States v. Kirkpatrick*, 9 Wheat. 737, states the proposition rather differently. He says: "The law will apply the payments according to its own notions of justice." And in *Cremer v. Higgenson*, 1 Mason, 323, he says the law will apply the payment according to its own notion of the intrinsic justice and equity of the case. Another rule applicable to indefinite payments deduced from the case of *Devaynes v. Noble*, 1 Mer. 605, known as *Clayton's Case*, which was decided by Sir William Grant in the year 1816, is, that if neither party makes the appropriation, the law will apply the payment to the discharge of the several items of the account in the order of their priority, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side of it. Now, where there is a single running account between the same parties, in which third persons are not interested, the application of this rule is certainly well enough; for it will apply the payment according to the justice of the case. *Clayton's Case* was a case of a running account and indefinite payments, and the rule applies to just such cases.

There is nothing in the case to warrant the assumption that Sir William Grant intended to lay it down as an inflexible rule, applicable alike to all cases. Moreover the case itself did not necessitate the annunciation of such a rule. There had been an account drawn out and delivered to Clayton showing the appropriation of the payments, to which he made no objection, and the report of the master states that the silence of Clayton after the receipt of his banking account, was regarded as an admission of its correctness. "Both debtor and creditor must, therefore," says Sir William Grant, "be considered as having concurred in the appropriation." So that, it is apparent from the case that the appropriation had really been made by the parties themselves. The rule in itself is sound enough. It is its application to cases never contemplated by Sir William Grant that is objectionable. And it seems clear to us that whenever there are intervening equities in favor of third persons, the true doctrine is, that the

law will apply the payments according to its own notion of the intrinsic justice and equity of the case. We have said that the rule in *Clayton's Case* is not an inflexible rule. In the case of *Lysaght v. Walker*, 5 Bligh N. S. 1, decided in 1831, Lord Tenterden, who delivered the opinion of the house of lords, declared that there was no inflexible rule which necessarily required subsequent payments to be applied in payment of the first item of the account, when different interests were concerned. In *Stone v. Seymour*, 15 Wend. 33, decided in 1835, Chancellor Walworth, who delivered the opinion of the court of errors, declared as the result of his examination of the authorities in cases of indefinite payments "made on account of public moneys received and placed in general account by the officers of the treasury, or the controller, from time to time, without any specific appropriation thereof, and the accounts have not been stated and settled after the receipt of such payments, and where no intention was manifested by the debtor as to the application of the money, such general payments are not necessarily to be applied to the first item of charge on the debit side of the account, but they may thereafter be appropriated according to equity." And Senator Tracy thought that an inflexible application of the rule would be inconsistent with equity and reason. In the case of the *Postmaster-General v. Norvil*, 1 Gilp. 125, tried in the year 1829, it was ruled that a debtor could not appropriate a payment in such manner as to affect the relative liabilities or rights of his different sureties without their consent; that where a public officer has given successive official bonds with different sureties, moneys received subsequent to the execution of the latter cannot, before it is discharged, be applied to the payment of the former; and that where a public officer has given different bonds with different sureties, his payments must be so appropriated as to give each bond credit for the money respectively due and collected, and paid under it. The learned Judge Hopkinson, who tried the cause, after stating the general doctrine of the appropriation of payments, proceeds to say: "There can be no objection to this doctrine where no party is concerned but the debtor and creditor. But how is it in a case like the present? Here a public officer, in the receipt of public money, has given security for the faithful performance of his duties, and for the accounting for and payment of all the moneys which shall come to his hands. The sureties remain for several years, and then a

new bond with new sureties is given, at which time there is a large sum of money actually due to the public, and for which the sureties on the first bond were liable, that is to say, the penalty of the first bond was actually forfeited and the amount of the defalcation due and recoverable from the sureties in it. Can the government, for whose security both bonds were given, apply the money collected by the officer after and under the second bond, and on the responsibility of the sureties in the second bond, to the payment or credit of the balance due on moneys collected, and which ought to have been paid under the first bond? Can the burden actually resting on the first sureties—can the forfeiture actually incurred by them—be shifted by the process of appropriation, without the consent or knowledge of the second sureties, from the shoulders of the first and be put upon the second? I am of opinion, most clearly, that it cannot; and that each set of sureties must answer for its own defaults, and is entitled to be credited with its own payments. If authority can be required to sustain a principle of such obvious justice, it will be found in the case of *United States v. January*, 7 Cranch, 572." Following this, we have, in the year 1833, the case of *United States v. Eckford's Ex'rs*, 1 How. 261, which was the case of a public officer, who had given different official bonds, at different times, with different sets of sureties. Mr. Justice McLean, who delivered the opinion of the court, says: "The rule as to the appropriation of payments by debtor or creditor in the ordinary transactions of business is earnestly relied on as applicable to the present case. And all the leading authorities on the subject are referred to. In the case of *Devayne v. Noble* 1 Mer. 606 (*Clayton's Case*), which governs the application of payments, was elaborately considered. But the applicability of this doctrine is not admitted. We think the rule established by this court in the case of *United States v. January*, 7 Cranch, 572, is the true one."

Then we have in the year 1849 the case of *Jones v. United States*, 7 How. 688, in which it is declared by the court that "in instances of official bonds executed by the principal at different times, with different and distinct sets of sureties, this court has settled the law to be, that the responsibility of the separate sets of sureties must have reference to and be limited by the periods for which they respectively undertake by their contract, and that neither the misfeasance nor non-feasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have

undertaken, can be transferred to the period for which alone another set have made themselves answerable. Such is the rule established in the cases of *United States v. January* and *United States v. Eckford's Ex'rs.*" We shall not attempt to reconcile either the real or apparent discrepancies or conflict in the decisions on this subject. We consider that the supreme court of the United States, in the cases of *United States v. January*, *United States v. Eckford's Ex'rs.*, and *Jones v. United States*, just referred to, have finally settled the law as to the appropriation of payments where different sets of sureties are concerned, — we say finally settled the law, because whatever is settled right, upon just principles, should be held to be settled forever. We fully agree with the chancellor in all his conclusions, and therefore are of opinion that his decree in this case should be affirmed in all respects.

EFFECT UPON LIABILITIES OF SURETIES UPON OFFICIAL BONDS of legislative acts changing or enlarging the duties and liabilities of the principal. This subject will be found fully treated in the note to *People v. Vilas*, 93 Am. Dec. 520.

LIABILITY OF SURETY IS NOT TO BE EXTENDED BEYOND TERMS OF HIS CONTRACT, and incidents and intendments not necessarily deducible from the language employed are never indulged: *Lipcomb v. Postell*, 77 Am. Dec. 651, and note 658; *Strawbridge v. Baltimore etc. R. R. Co.*, 74 Id. 541, and note 545.

SURETY IS NOT DISCHARGED BY MERE PASSIVENESS ON PART OF CREDITOR, but he must do no act calculated to injure the surety or subject him to increased risk: *Johnson v. Planters' Bank*, 43 Am. Dec. 480; *Sneed's Ex'r v. White*, 20 Id. 175; *Strawbridge v. Baltimore etc. R. R. Co.*, 74 Id. 541, and note 545.

ANSWER RESPONSIVE TO BILL IS CONCLUSIVE AS EVIDENCE unless overcome by the testimony of two witnesses or its equivalent: *Cassell v. Roes*, 85 Am. Dec. 270, and note 276; *Belford v. Crane*, 84 Id. 155, and note 162; *Trout v. Emmons*, 81 Id. 326, and note 328.

TO CONSTITUTE FRAUDULENT SUPPRESSIO VERI, there must be a suppression of facts which one party is under a legal or equitable obligation to communicate, and in respect to which he cannot be innocently silent: *Jusan v. Toulmin*, 44 Am. Dec. 448, and note 463.

LEGISLATIVE INTENT IN CONSTRUCTION OF STATUTES: *Welch v. Wadsworth*, 79 Am. Dec. 236, and note 243; *Parkinson v. State*, 74 Id. 522, and note 534. Considerations of public policy, though not usually a matter for judicial cognizance, may be regarded in cases of doubtful interpretation: *Coulter v. Robertson*, 57 Id. 168. And a statute will not be construed so as to work public mischief unless such construction is required by clear, unequivocal words: *People v. Lambier*, 47 Id. 273, and note 279; *Rogers v. Brent*, 50 Id. 422.

RULE AS TO APPLICATION OF PAYMENTS: *Parks v. Ingram*, 55 Am. Dec. 153, and note 159; *Smith v. Loyd*, 37 Id. 621. Appropriation of payments made by an officer who becomes a defaulter, and who has given successive official bonds with different sureties: See *Inhabitants of Redfield v. Shaver*, 79 Id. 592, and note 597; *State v. Smith*, 72 Id. 204, and note 207; and see *County of Wapello v. Bigham*, 74 Id. 370, and note 374.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

STATE v. KIRKE.

[12 FLORIDA, 278.]

- AT COMMON LAW, COURTS HAD NO POWER TO ADMIT ATTORNEYS OR COUNSELORS TO PRACTICE.** All parties had to appear in person. History and practice as to appointment and admission of attorneys stated.
- AT COMMON LAW, COURTS HAD POWER TO DISBAR ATTORNEYS AFTER ADMISSION,** when guilty of such conduct as would justify it. The power to admit is one thing, and the power to disbar another.
- STATUTES OF FLORIDA REGULATING ADMISSION OF ATTORNEYS DO NOT AFFECT POWER OF COURTS TO DISBAR THEM.** Such a power is inherent in courts, and is essential to the maintenance of their own dignity, and the respectability of their officers.
- COUNTY COURT OF FLORIDA HAS POWER TO DISBAR ATTORNEY, AND TO DENY HIM** the rights of an officer of that court; but its judgment extends only to a denial of an attorney's privileges in that court. It does not directly affect his rights in other courts.
- WHILE AUTHORITY OF COURTS TO DISBAR ATTORNEYS SHOULD REMAIN UNIMPAIRED, PROTECTION SHOULD BE GIVEN ATTORNEYS** against a wrongful exercise of this power; and the supreme court will interpose when the inferior court has decided erroneously on the testimony, and a plain case of wrong and injustice is brought to its attention.
- PROPER COURSE OF PROCEEDING TO HAVE ATTORNEY DISBARRED IS TO PRESENT CHARGE TO COURT,** and it will direct a rule to show cause why the name of the attorney should not be stricken from the roll, if a case proper for the action of the court is presented. This rule is awarded, served, and returned, and the court hears and determines the matter according to law.
- REGULAR COMPLAINT AGAINST ATTORNEY OUGHT NOT TO BE RECEIVED AND ACTED ON UNLESS MADE ON OATH;** and the charge made should be specific and particular, so that the officer may be aware of the precise nature of the accusation he is to meet.
- MANDAMUS IS NOT WRIT OF RIGHT, BUT PREROGATIVE WRIT,** which may properly issue upon a proper case previously shown to the satisfaction of the court.

GRANTING OF WRIT OF MANDAMUS IS MATTER TO BE EXERCISED WITH SOUND DISCRETION, and it may be refused when proper to do so.

MANDAMUS SHOULD NOT BE DENIED WHERE THERE IS RIGHT, and the law has established no specific remedy. It should issue to prevent a failure of justice.

MANDAMUS CANNOT BE USED TO CONTROL DISCRETION OR CONCLUSIONS OF FACT, as a general rule; but some cases are here given where jurisdiction by *mandamus* has been exercised to control discretion.

MANDAMUS MAY BE USED TO CONTROL DISCRETION OF INFERIOR COURT in striking an attorney's name from its rolls where that discretion was exercised with manifest injustice.

CASES SHOWING HOW MANDAMUS HAS BEEN USED AS WRIT OF RESTITUTION.

MANDAMUS IS APPROPRIATE REMEDY TO RESTORE ATTORNEY TO PRACTICE IN INFERIOR COURT, especially where no appeal or writ of error from the order of the inferior court is authorized by law.

MANDAMUS issued at the instance of the relator, J. D. Wolfe, to William Kirke, county judge, etc. The facts are stated in the opinion.

A. J. Peeler, for the relator.

A. C. Blount, for the respondent.

By Court, WESTCOTT, J. This case arises out of an order of the county court of Escambia County, striking the name of J. Dennis Wolfe, an attorney of that court, from its roll of attorneys, and depriving him of the rights and privileges of an attorney of that court.

Upon the filing of a transcript of the record of the judgment of the county court containing the evidence there introduced, and a petition praying an alternative writ of *mandamus*, this court, after inspection, granted the prayer of the petition, and awarded an alternative writ of *mandamus* directed to the judge of the county court. The judge of the county court has made his return to the alternative writ in the words following:—

“That he claims the right, as judge of the county court of Escambia County, upon the facts apparent upon the record accompanying the petition in this case, to disbar the said J. Dennis Wolfe from practicing as an attorney at law in his court; and he admits that he has caused the name of the said Wolfe, as attorney as aforesaid, to be stricken from the roll of attorneys of his said court, as stated in said petition.”

To this return a demurrer is filed, and joinder in demurrer.

The grounds of the demurrer are two:—

“1. That the respondent, as judge of the county court of Escambia County, had not the power or authority by law to

disbar the relator, or to strike his name from the roll of attorneys of his court, or to refuse him the rights and privileges of an attorney therein."

The right of the petitioner to practice as an attorney in the county court is not derived from any order or proceeding in that court. The law regulating the subject (Thompson's Dig. 322, 323) provides: "It shall be the duty of any person wishing to obtain a license to practice law in the courts of this state to present to one of the judges of the circuit court satisfactory evidence of good moral character, and that he is twenty-one years of age; whereupon the judge shall examine into the qualifications of the applicant, and if found qualified he shall grant him a license to practice in the several courts of this state."

"No person shall be permitted to appear as an attorney and counselor at law in any cause in the courts of this state until he shall have produced to the court in which he proposes to practice a license signed by one of the circuit courts, or a certificate under the hand and seal of a clerk of some one of the circuit courts of the United States, of his having been admitted to practice in said circuit court; which license or certificate shall be entered upon the minutes of the court in which the said attorney wishes to practice, and the original returned by the clerk to said attorney."

It will be thus seen that the right to practice in the county court results from the grant of a license to practice in the several courts of this state by a judge of one of the circuit courts of this state; and that upon the production of a license so signed it is required that he shall be permitted to appear as an attorney and counselor at law in any of the courts of this state. The petitioner having been so admitted by a judge of the circuit court, and having taken the necessary steps to become entitled to practice in the county court, contends that there is no power in the county court to prohibit him from practicing in that court; that the right to practice in the county court does not emanate from any power which it has over the admission of attorneys is plain; that the judge of the county court has no authority to deny admission as an attorney of that court to one who exhibits "a license to practice in the several courts of this state granted in conformity to law" is clear; but does it follow that because the admission of the party to practice does not result from any exercise of power by the county court, that after such admission the

county court cannot, after due process of law, deny the party so admitted the rights of an attorney of that court for good cause? Does not the grant of the license to practice in the several courts by the circuit court operate simply to entitle him to the privilege of an attorney in the several courts without further examination? and does he not, after such admission, become subject to be denied the right to practice before that court? These questions involve an inquiry into the effect of the statute.

What was the law independent of the statute? At common law the courts had no power to admit attorneys or counselors, and it has been held that for this reason this is a power not inherent in a court, and, in the absence of constitutional provisions, a matter for regulation by the legislative department of the government. It cannot be claimed as a part of the inherent power of courts, or as resulting necessarily from any power which they have. Indeed, barristers or counselors at law in England were never even appointed by the courts, but were called to the bar by the Inns of Court, which were associations not vested with even corporate powers, nor could the courts control the discretion of the Inns of Court as to whom they would call. In England the power of the courts to appoint attorneys has been from time to time regulated by statute. There were some acts anterior to that date, but the act which gave shape to the matter, and became a model, was the act of 4 Henry IV., chapter 18, which, among other things, provided "that all attorneys should be examined by the justices, and by their discretion their names shall be put upon the roll," and the matter has been further controlled and regulated by subsequent statutes: 3 Jac. I., c. 7; 6 & 7 Vict., c. 73; 20 & 21 Vict., c. 77.

In some of the American colonies the power of appointing attorneys was exercised by the governor of the colony, who usually took advice from the chief justice of the supreme court.

Before the statutes above mentioned, which regulated the subject and gave the courts the power to examine and admit attorneys, the courts would not suffer suitors to have an attorney, because the words of the writ were to command the defendant to appear, and that was always taken to be in proper person. At common law all parties had to appear in person. Attorneys, anterior to the statutes, could only be had by those who had permission of the king, and such attorneys were

simply attorneys in fact. It was the custom of the king to direct his writs to the judges, commanding them to receive such persons by their attorney, and the judges were bound so to do: Fitzh. Abr. 59.

In New York, by statute, persons upon whom the degree of bachelor of laws has been conferred by the law school of Columbia College are entitled, without any further examination, to be admitted to practice in the courts of that state, and the court of appeals has compelled the supreme court, against its will, to admit them. Selden, J., in delivering the opinion of the court in the *Matter of the Application of Henry W. Cooper*, 22 N. Y. 81, where this question arose, says: "So far as I can see, admission may as well have been by the governor, the attorney-general, or any other public functionary, as by the courts. It is a question of mere legislative discretion." At common law, the courts, except certain inferior courts where such custom prevailed, had thus no power over the subject of admission of attorneys, and the statute of this state, unless the English statutes upon the subject were in force, was necessary in order that attorneys might be admitted to practice in the courts; for, in the absence of statutory regulations, the common-law rule that all parties should appear in person would have been operative. In the construction of statutes of this kind the rule is simple. We first find "how the common law stood at the making of the act." From that we ascertain what the mischief was for which the common law did not provide. This being done, the statute we are construing gives us the remedy, "and it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy": Co. Lit. 11, 42; 1 Bla. Com. 87.

We are of opinion that the mischief here was the want of common-law power in the courts to admit attorneys, and that the legislature, in the exercise of a power which it possessed beyond question, proposed by this act to place the control of the subject of admission in the courts; that the circuit courts, being courts of general jurisdiction, this power was vested in them. There is nothing in the language of the act, or in the common-law evil that it was to remedy, which in any manner justifies the idea that its purpose or effect was to do anything more than to provide a power in the circuit courts to "grant licenses to practice law," upon the exhibition of which, signed by one of the judges, it should be recorded by the other court upon its minutes, etc.

The statute of Westminster 1, 3 Edw. I., c. 29, which was before there was any recognized class of practitioners as attorneys, provided "that if any sergeant, counter, or other, do any matter of deceit or collusion in the king's court, or consent to it, to deceive or entrap the court or one of the parties, he shall be no more heard in the court to plead for any one." Lord Coke says these practices "were against the common law, and therefore this act was made in affirmance of the common law": 2 Inst. 213, 214.

And it is clear that even counselors who were neither officers of any court nor invested with any judicial office, but barely practiced as counselors, were subject to be controlled by this power of the courts: 2 Reeves's Hist. 126; 1 Hawk. P. C., c. 27, p. 461; *Rex v. Wheeler*, 3 Burr. 1256.

The power to punish as well by imprisonment as by prohibiting parties from practicing, was a power incident to courts, existed before there was any recognized class of attorneys, and when in fact no roll of attorneys existed, for the first roll was introduced by 4 Hen. IV., c. 18.

That courts have had and exercised a summary jurisdiction of this character over their attorneys, cases from the earliest period to the present time establish: *Williamson, Meggison, and Beaumont*, 4 Moore, 171; *Summersett v. Adamson*, 7 Id. 376; 1 Hawk. P. C. 369; *Smith v. Tennessee*, 1 Yerg. 238; *Turpin v. Eagle Creek Co.*, 48 Ind. 49.

Justice Nelson, in the very recent case of *Ex parte Bradley*, 7 Wall. 364, says: "We do not doubt the power of the court to punish attorneys for misbehavior in the practice of the profession. This power has been exercised and recognized ever since the organization of courts." This was said in reference to the disbarring of an attorney, the matter then under investigation. The right of the courts to exercise this power existed before they controlled the subject of admission. One was a common-law power, the other a power derived from statute. The rule applicable to the construction of statutes is, that an act in derogation of the common law is to be construed strictly. In this case, however, we do not think that the statute has anything to do with the power of the courts over an attorney after he has been admitted. It does not propose to affect it, and no principle of construction need be invoked. It was urged at bar that the county court was not such a court as possessed this power, and that to admit its power to this extent is to admit its power to control the circuit and

supreme courts in the matter. Each court possesses this power as a necessary incident to its organization. The county court having disbarred an attorney does not affect his right to practice in the other courts; and if he has been admitted in the county and supreme courts, and has become entitled to the rights of an officer there, the action of the circuit court can only affect his right to practice in that court; because the power to admit is one thing, and the power to disbar another. The one is confined to the circuit courts, the other is possessed by the county and supreme and circuit courts.

The case of *People v. Justices*, 1 Johns. Cas. 183, cited by petitioner, was in an inferior court, and the court of errors in New York, in reviewing the decision of the court of common pleas, say: "By the constitution of this state, the power of appointing attorneys was transferred to the respective courts. The constitution did no more, however, than to transfer or vest in the courts the power of appointment which had before been possessed by the governor of the colony. The expression, 'that they should be governed by the rules and orders of the court,' gives no additional authority over them; and they would have been equally subject to those rules and orders if the constitution had been silent in this respect." The court further say that it takes jurisdiction of the case upon the ground that it has "the power of correcting any abuse or injustice of inferior courts towards their officers."

The fact that a removal by the court of common pleas, under the statutes of New York, would have operated to prevent his admission to practice in the supreme court was one of the matters which the court urged as a reason for its exercise of its general superintending power; but the court does not sustain the idea that a removal by the common pleas would operate to remove from the other courts. The statute would not permit any other state court to admit the party to practice if another state court had, before his application, disbarred him.

In *People v. Turner*, 1 Cal. 190 [52 Am. Dec. 205], the application was for an alternative writ of *mandamus*, and the matter appears to have received but little attention. The court in this case say: "The proceedings in the court below are irregular; and inasmuch as the relators have received from this court a license to practice as attorneys at law in the supreme court, and by the rules of court are authorized by

virtue thereof to practice in all the courts of this state, we are called upon to afford relief."

As we understand the opinion, the "irregularity" in the proceedings was the ground of their interference, and not the opinion that the action of the court below could directly affect the standing of the attorney in the supreme court. As to this point, the supreme court of California bases its views upon the single authority in 1 Johnson's Cases, which we have before commented upon, and which we have seen lays down the rule to be, that the court of common pleas in New York, though an inferior court, possessed, independent of statutory authority, the power to disbar.

Whether the county court is an inferior court of limited jurisdiction, within the meaning of the authorities upon that subject, we do not determine. It may be remarked, however, that it is by statute declared a court of record, with general powers to carry out its jurisdiction; that its system of pleading and practice, in other than probate and criminal matters, is similar to that of the circuit court, and that under the constitution it has a considerable jurisdiction.

We have found no authority which would sustain the position that a court with the jurisdiction and power of the county court did not possess this power, and none has been cited at bar.

We are of the opinion that there is no want of power in the county court, in a proper case, and upon proper proceedings, to disbar one of its attorneys.

It remains to consider the second ground of demurrer, which is, "that the record which accompanies relator's petition, upon which respondent relies in his return as justification for the disbarment of the relator, shows no sufficient cause in law or in fact for disbarring the relator or striking his name from the roll of attorneys of the county court of Escambia County, or refusing him the rights and privileges of an attorney at law thereon."

We do not doubt our power to exercise control over inferior courts in matters of this character in certain cases, nor that the manner of proceeding in this case is correctly conceived: *People v. Justices*, 1 Johns. Cas. 181; *Ex parte Burr*, 9 Wheat. 530; *Tapping on Mandamus*, 14, 45; *Hurst's Case*, 1 Lev. 75; *Leigh's Case*, 3 Mod. 335; *White's Case*, 6 Id. 18; 4 Bac. Abr. 501; *Lee v. Ozenden*, 3 Salk. 230; 2 Tomlin's Law Dict. 514; *Ex parte Bradley*, 7 Wall. 364.

In some of the states the remedy has been by appeal from the judgment of the court below (see these cases reviewed in *In re Application of Henry W. Cooper*, 22 N. Y. 68), but we think that the question is settled by the late decision of the supreme court of the United States, in the case of *Ex parte Bradley*, *supra*, where *mandamus* was adopted and sustained. Say the court, in *Ex parte Bradley*, *supra*: "This writ is applicable only in the supervision of the proceedings of inferior courts, in cases where there is a legal right without any existing legal remedy. It is upon this ground that the remedy has been applied from an early day,—indeed, since the organization of courts and admission of attorneys to practice therein down to the present time,—to correct the abuses of inferior courts in summary proceedings against their officers, and especially against the attorneys and counselors of the courts. The order disbarring them, or subjecting them to fine and imprisonment, is not reviewable by writ of error, it not being a judgment in the sense of the law for which this writ will lie. Without, therefore, the use of the writ of *mandamus*, however flagrant the wrong committed against these officers, they would be destitute of any redress. The attorney or counselor disbarred from caprice, prejudice, or passion, and thus suddenly deprived of the only means of an honorable support of himself and family, upon the contrary doctrine contended for, would be utterly remediless." Nor have inferior courts an unlimited discretion in such matters, for if it be exercised with manifest injustice there is a remedy: Tapping on *Mandamus*, 14.

It must be a sound discretion and according to law: *Ex parte Secombe*, 19 How. 13; *Ex parte Burr*, 9 Wheat. 530; *Ex parte Bradley*, 7 Wall. 364.

In the cases of *Ex parte Secombe* and *Ex parte Bradley*, *supra*, there is apparently a conflict in the views of the court.

In *Ex parte Bradley*, *supra*, the court say: "The order disbarring them [attorneys], or subjecting them to fine and imprisonment, is not reviewable by writ of error." In *Ex parte Secombe*, *supra*, the court, when reviewing an order of similar character, say: "It is not necessary to inquire whether this decision of the territorial court can be reviewed here in any other form of proceeding. But the court are of opinion that he is not entitled to a remedy by *mandamus*. Undoubtedly, the judgment of an inferior court may be reversed in a superior one which possesses appellate power over it, and a man-

date may be issued commanding it to carry into execution the judgment of the appellate tribunal. But it cannot be reviewed and reversed in this form of proceeding, however erroneous it may be or supposed to be."

Again, in *Ex parte Secombe, supra*, which was a case in which the attorney was disbarred for what was alleged to be a contempt in open court, without notice or hearing, and during his absence, the court say: "These principles [those above stated denying the remedy by *mandamus*] apply with equal force to the proceedings adopted by the court in making the removal; that is to say, that *mandamus* is not the remedy to correct and set aside such irregularity, or to relieve the attorney from its consequences"; while in the very recent case of *Ex parte Bradley, supra*, it is said: "The proceeding is admitted to be the recognized remedy when the case is outside of the exercise of this discretion"; that is, as we understand it, a sound discretion; "and is one of irregularity or against law, or of flagrant injustice, or without jurisdiction." Chief Justice Taney, in *Ex parte Secombe, supra*, speaking of the exercise of discretion, says: "The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself."

From a review of the English and American cases on this subject, we are of opinion that if the evidence in this case discloses that gross injustice or wrong has been done, this is the only remedy, and it should be administered. The matter charged here is not for any contempt in the presence of the court, nor is there any fine or sentence of imprisonment resulting from contempt.

Under the constitution of this state, the power of this court with reference to inferior tribunals is much like that of the court of king's bench in England: *Betts v. Turner*, 2 Caines Cas. 309; *State of Florida ex rel. Attorney-General v. Gleason*, 12 Fla. 190.

Its jurisdiction is more extensive than that of the supreme court of the United States in respect to writs of this character. In the supreme court of the United States they can be used only as incidents to appellate jurisdiction. Here

they are writs which appertain to the original jurisdiction of this court, and they can be made available when they are the proper remedies.

"Writs of *mandamus* are granted in England to restore officers in corporations, colleges, etc., unjustly turned out, and freemen wrongfully disfranchised": 2 Tomlin's Law Dict. 372.

It is also the remedy "to restore an attorney in an inferior court, for the office of an attorney is necessary to the administration of justice, and is of a public concern": *Hurst's Case*, 1 Lev. 75; *Leigh's Case*, 3 Mod. 333; *White's Case*, 6 Id. 18; so, to restore a school-master: *Parkinson's Case*, Comb. 144; so, to restore one to the stewardship of a court: *Stamp's Case*, 2 Lev. 18; so, to restore a clerk of the peace: *Rex v. Owen*, Comb. 317; so, to restore the register of a bishop's court: *Anonymous*, Id. 264.

If it be true, as held by the supreme court of the United States, that a writ of error does not lie to an order disbaring an attorney, then to deny the remedy by *mandamus* is to make the office of an attorney one entirely dependent upon the pleasure of inferior courts; for if a writ of error cannot be prosecuted in that court, it cannot be under our statute here. We have been able to find no case in which the broad proposition that an inferior court can, though it conform to the proper rules of practice, without cause disbar an attorney, and there is no remedy, is sustained. And if there is no remedy by writ of error (under the statute), a refusal here to grant relief, if it be a case of hardship and plain wrong, upon the testimony, would be to establish, without any controlling precedent in point, a rule both iniquitous and unjust in the extreme, making a large and most respectable class of persons, who have given their lives to their profession, subject to be deprived of a right in this state conferred by statute, at the pleasure of inferior courts, from "passion, prejudice, or personal hostility," without any means of redress.

An attorney's rights in the county court result, in this state, from statute. When admitted as an officer of the court, the rights and the incidents to his position are not held *durante bene placito*. He cannot be said to hold his rights, privileges, or franchises at the absolute will and pleasure of each court in which the statute authorizes him to practice. Under the laws of New York, the possession by a graduate of the law school of Columbia College of a diploma conferring the degree of

Bachelor of Laws, entitled a party, being of proper age, to admission to practice. H. W. Cooper presented this evidence of his qualifications, which gave him under the statute a right of admission, and it was denied by the supreme court. An appeal was taken to the court of appeals. Chief Justice Comstock and justices Denio and Wright held that an appeal could not be taken from such an order, and Selden, who delivered the opinion of the court (the chief justice and justices Denio and Wright dissenting), sustained the appeal only on the ground that the statute regulating appeals gave the court of appeals "jurisdiction to review every actual determination in a final order affecting a substantial right made in a special proceeding"; the court holding that it was a special proceeding. We have no similar statute here, and it not clearly seen how this order or judgment could be brought here or to the circuit court by appeal or writ of error under our constitution and laws. See also *Hardin Co. Ct. v. Hardin*, 1 Peck. 292.

One of the offices of a *mandamus*, which is founded upon Magna Charta, is to restrain excesses of inferior tribunals, and it is issued to inferior courts to enforce the due exercise of those judicial or ministerial powers with which they are invested. It is in its nature a writ of restitution: 3 Bla. Com. 111, 265; Tapping on *Mandamus*, 105, 5, 199; Bac. Abr., tit. *Mandamus*, D, p. 273, E, p. 278; 3 Stephens's *Nisi Prius*, 2292; *Ex parte Crane*, 5 Pet. 190; *Love v. Simms*, 9 Wheat. 521; *Ex parte Bradley*, 7 Wall. 364.

In *Rex v. Barker*, 3 Burr. 1265, Lord Mansfield said: "Where there is a right to execute an office or exercise a franchise, and a person is dispossessed of such right, and has no other specific legal remedy, this court ought to assist by *mandamus* upon reasons of justice, as the writ expresses,—Nos. A. B., *debitam et festinam justitiam* 'in hac parte fieri volentes ut est justum,' and upon reasons of public policy to preserve peace, order, and good government. A *mandamus* is a prerogative writ, to the aid of which the subject is entitled upon a proper case previously shown to the satisfaction of the court. It was introduced to prevent disorder from a failure of justice. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. The value of the matter or the degree of its importance to the public policy is not scrupulously weighed. If there be a right, and no other

specific remedy, this should not be denied. *Writs of mandamus have been granted to restore an attorney to practice in an inferior court.*" (The italics in the last sentence are made by this court.)

In *People v. Superior Court*, 5 Wend. 114, speaking of the jurisdiction, the court say: "The jurisdiction of this court by *mandamus* is one of immense importance and extent. It extends to all inferior courts and tribunals"; and in speaking of controlling their discretion, it is said: "The security of the citizen is essentially increased whenever the territory of undefined discretion is circumscribed by the establishment of well-defined and clear principles."

The supreme court of Massachusetts in 1851, *Jennings v. Fisher*, 7 Cush. 239, when in argument it was insisted that the writ could not be claimed as a right, said: "The application is to the discretion of the court; but this is not an arbitrary discretion; it is a judicial discretion; and when there is a right, and the law has established no specific remedy, this writ should not be denied. This writ was granted only to prevent a failure of justice, and is no doubt more freely and frequently granted at the present time than it was formerly."

The court, in *Ex parte Fleming*, 4 Hill, 583, say: "The *mandamus* is a prerogative writ, which we have power to issue or withhold, according to our discretion."

In this state, the right of an attorney to practice in the county court is a legal right resulting from statute. "His office of an attorney is necessary to the administration of justice, and is of public concern," as was remarked in *White's Case*, 6 Mod. 18; and when "dispossessed of such right, has no other specific legal remedy" but *mandamus*; and if even upon the facts alone a case of plain wrong is presented, we will correct it when the act is by an inferior court. There is no case which, while denying a remedy by writ of error, also denies a remedy by *mandamus*; and there is no good reason why the discretion of inferior courts in respect to their officers should not be controlled in matters of this kind.

While, as a general rule, a discretion will not be controlled by *mandamus*, yet it is going too far to say, as many of the courts have without full examination, that there have not been able courts, both in England and the United States, that have done so, in cases where there is much less reason for exercising this power than in cases of this kind, where often the discretion would be made the vehicle for the satisfaction of

personal ill feeling, though we do not intend to say that such was the case here.

Lord Ellenborough, chief justice, in *King v. Justices of Wiltshire*, 10 East, 406, A. D. 1808, said: "The magistrates certainly had a discretion to exercise with respect to what was reasonable time for giving the notice of appeal; and we think that in this case they have not exercised that discretion in a way that we ought to give effect to, but that we ought to interfere and correct it"; and a peremptory *mandamus* was awarded, directing them to enter continuances. In *Rex v. Commissioners of the Flockwood Enclosure*, 2 Chit. 325, A. D. 1819, it was held that "in a motion for *mandamus* the court will not grant the writ where discretion was given to the commissioners, and no ground be shown that they have done it wrongfully."

The purpose of the motion was to effect an exchange of lands, which was a matter of discretion with the commissioners, and the chief justice took particular notice of the fact that equality of interest or value was not shown.

In *King v. Justices of Lancashire*, 7 Dowl. & R. 692, where an appeal against an order of removal was dismissed on the ground that the appellant had not given the notice required by the rules of the justices, the court, thinking it reasonable that the appeal should be heard, granted a *mandamus* to the justices to enter continuances, and hear the appeal: See also *Ex parte Becke*, 3 Barn. & Adol. 704; *King v. Justices of Monmouthshire*, 3 Dowl. 310, 311.

Tapping on *Mandamus*, the ablest elementary writer on the subject, states the rule to be, "that the court will not interfere with the discretion of an inferior jurisdiction when it is exercised in accordance with reasonable rules of practice. It must, however, be clearly understood, that although there may be a discretionary power, yet if it be exercised with manifest injustice, the court is not precluded from commanding its due exercise, the jurisdiction under such circumstances being clearly established": Tapping on *Mandamus*, 14, 199; *Ex parte Becke*, 3 Barn. & Adol. 704; *King v. Justices*, 10 East, 404; *King v. Justices*, 7 Barn. & C. 692; 3 Bla. Com. 265.

Taking the state of New York as an illustration of the practice and views of the American courts, we find in *Blunt v. Greenwood*, 1 Cow. 15, it was insisted by the attorney that the granting a rule to set aside a *feri facias* was matter of discretion, and having been passed upon, could not be opened.

The court of errors directed the inferior court, upon *mandamus*, to vacate and set aside the rule.

In *Ex parte Baily*, 2 Cow. 483, which was a motion for a *mandamus* to an inferior court, commanding them to grant a new trial, the court say, as to the remedy by *mandamus*, it may be proper to remark, that though in extreme cases we might interfere, and control the court below upon questions of fact presented in the form of a motion for a new trial, yet it is a remedy which should be used very sparingly.

In *People v. Superior Court*, 5 Wend. 114, *mandamus* was granted to vacate a rule granting a new trial, where the matter was considered fully and discussed elaborately. In *Judges v. People*, 18 Wend. 103, the court hold that there is no jurisdiction by *mandamus* to control a discretion, after elaborate and full examination, the opinion of the court being delivered by the president of the senate; but it is to be noticed in this case that Chancellor Walworth remarked: "It is not necessary to the decision of this case that I should examine the question of jurisdiction, and I should prefer to delay a decision thereon until it could be more fully argued than was done in the present case." In *People v. Judges*, 20 Id. 658, the rule laid down in the last case stated was sustained and affirmed, except that it was there held "that ministerial officers and corporations may be required by this writ to act in a particular manner, or even to reverse what they have already done."

In this state, it has been refused to control such discretion as is possessed by executive officers in auditing accounts; among other reasons, because it would be an indirect method of suing the state: *Blewitt v. Nicholson*, 3 Fla. 202. It is hardly necessary to say that this is a very different case from the one at bar. These officers belong to a different department of the government.

In the case of *Suydam v. Marine Ins. Co.*, 1 Johns. 182 [3 Am. Dec. 307], before cited, which was a case precisely similar to this, the court say: "Two questions are made: 1. Whether the charges exhibited were supported by the proofs; 2. Whether the court of common pleas possessed the exclusive power of determining on the conduct of its own officers, or whether this court could interfere." As to the first, the court say: "We are of opinion that the affidavits do not sufficiently support the charge of malconduct, but are rather to be considered as evidence of mistake than of intentional error. At least, the ground of removal was too slight for a punishment so severe."

As to the second point, the court held that they did have "the power of correcting any abuse or injustice of inferior courts towards their officers."

The jurisdiction we do not doubt; the power is clear. The granting of the writ, however, is a matter to be exercised with a sound discretion, and we may refuse if we see proper; nor is the writ a matter of right to the petitioner; and the general rule is, without doubt, that matters of discretion or conclusions of fact will not be thus controlled. The legislative department of this state has expressed its opinion to the effect that the orders and judgments of the circuit courts of the state, depending on their uncontrolled discretion, should be reviewable in the supreme court: Laws of Florida, c. 521. This case, however, is not embraced in that law, and it is only referred to here to show the view of the legislative department of the government as to the propriety of reviewing discretion of this character. While the jurisdiction and power is unquestioned in certain cases, and the means here sought to make that power operative is correct, yet it must be a plain case of wrong to induce this court to control an inferior court in the exercise of a power which is essential to the maintenance of its own dignity and the respectability of its officers.

The proceedings in this case are irregular in several respects.

1. A rule to show cause is awarded before any proper ground is laid. It appears from the record that the judge awarded a rule to show cause why the name of the attorney should not be stricken from the roll of attorneys of the county court "for conduct unbecoming an officer of the court in representing himself as an attorney in a matter for the purpose of influencing the same, when, in truth and in fact, he was not such attorney." It appears that A. C. Blount made oath that he believed that the matter set forth in the "above rule" was true, and hence, so far as it appears from the record, there was no ground laid for the rule before it was issued. It is unusual for any party to swear to the truth of facts set up in the process of courts; whatever facts are alleged as the basis of its action by the court are its own deductions from what has been previously laid before it or has come within its judicial view. In this case the court seems to have acted without either.

2. It does not appear that the rule was served, or that service was expressly waived, or that the rule was made returnable at any certain day. It does appear, though, that the petitioner was present at the taking of the evidence, and was

heard in his defense, and we are inclined to think that this cures this defect. Where it is intended to apply to the court to have an attorney disbarred, the proper course of proceeding is to present the evidence relied on to the court, and it will direct a rule to show cause to be entered if a case proper for the action of the court be presented. This rule is served and returned, and the court hears and determines the case according to law: *In re Percy*, 36 N. Y. 651; *Van Rensselaer v. Akin*, 22 Wend. 656; *Smith v. State*, 1 Yerg. 229.

A regular complaint against an attorney, says Chief Justice Marshall, ought not to be received and acted on unless made on oath: *Ex parte Burr*, 9 Wheat. 529. It has been held by some of the courts that the charge made must be specific and particular, so that the officer may be aware of the precise nature of the charge he is to meet; and we think this is the correct rule: *Perry v. State*, 3 G. Greene, 551.

This is a summary proceeding, involving the professional character of the party, and the result of which, if adverse to him, deprives him, *pro tanto*, of the vocation from which the support of himself and his family is derived. We have no like proceedings to deny a merchant the right to vend his goods or the farmer to cultivate his farm, and while it is essential that the power of the courts should remain unimpaired in the exercise of this great and peculiar function, it is not the less so that the right of the officer should be protected. We think that the precise "matter" in which he represented himself as an attorney falsely should have been set forth. It remains to consider the facts of this case as disclosed by the record.

From the evidence and the record it would seem that the charge was intended to be, that the attorney falsely represented to James Abercombie that he was the attorney of one B. C. Bennett, authorized to represent him in certain business matters connected with the Alabama and Florida railroad not yet adjusted between Abercombie and Bennett, Abercombie being the president of the railroad company, as well as certain other matters of business existing between them. It appears that on the 18th of August, Bennett had written to Wolfe requesting him, as one of the "city fathers" of Pensacola, to use his influence in securing the repayment to him, Bennett, of certain moneys which he had nine months before loaned. In this letter to Wolfe he writes: "I intend to start North in a few days, just as soon as I am able to travel. C. C.

Coles, of this place, will be my agent during my absence. He is a gentleman and a responsible man. If you wish to communicate with me you will address B. C. Bennett, Whistler, Alabama. I will leave my papers with Mr. Coles." It appears from the record that Wolfe wrote a reply to this letter, and that Bennett received it before he left. Its contents, however, are not disclosed, except so far as they may be inferred from the following letter written by Coles, the agent of Bennett, under Bennett's instructions, on the 28th of August, 1868, which Wolfe received:—

"WHISTLER, MOBILE COUNTY, ALA., August 28, 1868.

"J. DENNIS WOLFE, Esq.

"*Dear Sir*,—Your favor of the 25th came duly to hand a few hours before Mr. Bennett left for the North. He desires me to reply. You will find inclosed a copy of receipts against certain parties in your city. I would earnestly request you to give them your earliest attention, as Mr. Bennett will require all the money that he can get to pay his debts, and he expects me to receive the money from Pensacola to enable me to satisfy all demands against him. Hoping to hear from you soon I will close and remain,

"Respectfully yours,

C. C. COLES,

"For B. C. BENNETT.

"P. S. In addition to the amounts inclosed, Mr. Bennett informed me that he advanced to Messrs. Abercombie and Ruter the sum of \$475, as follows: \$400 of it was paid more than a year ago, and the balance sent them from Mobile last February or March. He also said that he loaned A. C. Blount \$30 on the twenty-fifth day of March, 1868. You will please see the above parties, and if possible have all the accounts settled up as soon as possible.

"Yours,

C. C. C."

In this letter was inclosed one receipt of James Abercombie as president of the Alabama and Florida Railroad Company to one R. M. Ruter for the sum of \$175, received to pay expenses connected with proceedings in bankruptcy by the company, and which was to be returned from the assets of the company, which receipt had been transferred by Ruter to Bennett. There were also two receipts of James Abercombie, president of the road, for sums to be applied to the case in bankruptcy and returned from its assets, one of which was for the sum of \$1,300, the other for \$75. There

were also other receipts of Wolfe and Blount to Ruter and Bennett for moneys received, with which it would appear from the record that Abercombie had some connection. It will be noted that the authorized agent of Bennett in this letter to Wolfe, whose business was that of a practicing attorney, instructed him as follows: "In addition to the amounts inclosed, Mr. Bennett informed me that he advanced to Messrs. Abercombie and Ruter the sum of \$475. . . . He also said that he loaned A. C. Blount \$30 on the twenty-fifth day of March, A. D. 1868. You will please see the above parties, and if possible have all the accounts settled up as soon as possible."

This is written by Mr. Bennett's agent, and is a postscript to a letter which the agent says he wrote at the "desire" of Bennett. The instruction is positive: "You will see the above parties, and if possible have all the accounts settled up as soon as possible." After receiving both of these letters, and on the 17th of September, A. D. 1868, Wolfe writes to Abercombie a respectful letter, in which occurs the following passage: "Mr. Bennett, whose attorney I am, desires me to say to you that he is desirous that a speedy adjustment of the matter between you and him may be made." Mr. Wolfe was a practicing attorney, and it was his business to attend to such matters in no other capacity, so far as this record discloses; and his conclusion that he was so desired to act is entirely justified by these letters. These letters show clearly what was the foundation for Wolfe's letter to Abercombie. The other evidence in the record discloses nothing that could have influenced Wolfe's conduct or affected his conclusions from these letters, and the true question which the court below should have considered was, Did these letters justify the conclusion to which Wolfe came, viz., that he was to act as Bennett's attorney, and even had he made a mistake in his conclusion, yet if there was reasonable ground for such apprehension, the court would not have been warranted under the circumstances in making the judgment it did.

The evidence which was introduced to sustain the charge was a letter of Bennett to Abercombie, dated November 17, 1868, in which he stated in effect that he did not constitute Wolfe his attorney in the matters referred to, "with instructions to demand of Abercombie a speedy settlement of the money transactions" he had had with him. Strictly speaking, Bennett may not have done so in person, but his agent, whom he described to Wolfe as "a gentleman and a responsi-

ble man," did give these instructions, substantially, in a letter written at his desire; and unless Bennett made this statement in view of this distinction, or in view of a difference in the precise words used by him and those by his agent, he either misrepresented the character of his agent, or made a grave mistake himself in his letter to Abercombie. So far as the fact that these charges were preferred by a brother member of the profession is concerned, it is highly commendable, if the motive was good and there appeared to be good cause. In this case, if Bennett's letter to Abercombie was all that was seen, it would naturally create the presumption of bad conduct. It is the duty of members of the bar to institute proceedings to disbar one that brings discredit upon the profession by highly improper conduct.

Without passing upon the question made at bar, that the alleged misconduct must have been when "acting as an officer of the county court, or in some suit, matter, or proceeding therein, or in which that court had jurisdiction," we are satisfied that the case is plain upon the testimony, and comes within the rule as enunciated by Chief Justice Marshall in *Ex parte Burr*, 9 Wheat. 529, which is, as we understand it, that this court can properly interpose when the county court has decided erroneously on the testimony, and its conduct is manifestly improper.

Our conclusion is, that a peremptory *mandamus* must issue.

RIGHTS OF ATTORNEY DISBARRED: See notes to *Clark v. People*, 12 Am. Dec. 186; *People v. Turner*, 52 Id. 302.

MANDAMUS WILL NOT LIE WHERE STATUTE HAS EXPRESSLY PROVIDED ANOTHER REMEDY: *Louisville etc. R. R. Co. v. State*, 87 Am. Dec. 358, note 362; extended note to *Dane v. Derby*, 89 Id. 729, 731, on law of *mandamus*.

MANDAMUS IS NOT WRIT OF RIGHT: See *State v. Graves*, 81 Am. Dec. 639, note 647. It is resorted to when there are no other adequate means of redress: Id.; note to *Dane v. Derby*, 89 Id. 728, 729.

MANDAMUS DOES NOT LIE TO CONTROL DISCRETION: *Miles v. Bradford*, 85 Am. Dec. 643; *People v. Pratt*, 87 Id. 110; note to *Dane v. Derby*, 89 Id. 732.

MANDAMUS IS PROPER REMEDY TO COMPEL RESTORATION OF ATTORNEY AFTER HIS DISBARMENT: See extended note to *Dane v. Derby*, 89 Am. Dec. 732, 740.

THE PRINCIPAL CASE WAS REFERRED to and approved in *State v. Maxwell*, 19 Fla. 38, where it was held that the supreme court would not interfere with the action of the circuit court, in the matter of summary proceedings to disbar an attorney, upon the ground that its conclusions as to the testimony were erroneous.

DISBARMENT OF ATTORNEYS, CAUSES AND PROCEEDINGS THEREFOR — NATURE OF DISBARMENT, AND POWER OF COURTS TO DISBAR. — The power of

courts to summarily disbar attorneys for professional misconduct is undoubted: *Baker v. Commonwealth*, 10 Bush, 592; *State v. Winton*, 5 Pac. Rep. 337; *Ex parte Wall*, 107 U. S. 265; S. C., 13 Fed. Rep. 814; *Ex parte Garland*, 4 Wall. 333; *Farlin v. Sook*, 1 Pac. Rep. 123; *People v. Palmer*, 61 Ill. 255; *State v. Burr*, 19 Neb. 593; S. C., 28 N. W. Rep. 261; *United States v. Porter*, 2 Cranch C. C. 60; *Ex parte Burr*, 2 Id. 379; *In re Serfass*, 9 Atl. Rep. 674; *Jeffries v. Laurie*, 27 Fed. Rep. 195; *Cohen v. Wright*, 22 Cal. 293; *In re Davics*, 93 Pa. St. 116; S. C., 39 Am. Rep. 729. The power to remove attorneys from the bar is possessed by all courts which have authority to admit attorneys to practice: *Bradley v. Fisher*, 13 Wall. 335; *Ex parte Cole*, 1 McCrary, 405; but the power is one which should be exercised with great caution and discretion: *Rice v. Commonwealth*, 18 B. Mon. 472; *Ex parte Robinson*, 19 Wall. 505; and, except where the matters constituting the ground of its action occur in open court in the presence of its judges, the power of the court should not be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense: *Bradley v. Fisher*, 13 Wall. 335; *Randall v. Brigham*, 7 Id. 523; *Ex parte Robinson*, 19 Id. 505; *Peyton's Appeal*, 12 Kan. 398. An attorney should not be disbarred or even suspended unless the court is satisfied of his guilt as shown by the evidence: *In re Houghton*, 67 Cal. 511; S. C., 8 Pac. Rep. 52; *In Matter of —*, 1 Hun, 321; *In re Lowenthal*, 3 Pac. Rep. 657; *People v. Barker*, 56 Ill. 299. An attorney may be suspended or disbarred for any matter or thing, whether sufficient to constitute a criminal offense, or create a civil liability, or not, if it shows that he is unfit to be permitted to practice in the courts as one of its officers: *Ex parte Cole*, 1 McCrary, 405. And in disbaring an attorney, the court simply determines whether the attorney is a fit person to be allowed to practice law, and not whether he is guilty of the commission of a crime; the latter being a matter for a criminal court of competent jurisdiction, under due process of law: *In re Treadwell*, 7 Pac. Rep. 724. Under the Illinois statute, the circuit court can only suspend; the power to disbar is vested in the supreme court: *Winkelman v. People*, 50 Ill. 449. Any court of record having jurisdiction may suspend an attorney for causes specified in the statute: *Mattler v. Schaffner*, 53 Ind. 245. In Indiana, where the statute prescribes the causes, courts cannot summarily disbar for causes not therein specified: *Ex parte Smith*, 28 Ind. 47; but in Michigan the court may suspend or remove attorneys for other causes than those specified in the statute: *In Matter of Mills*, 1 Mich. 392. The North Carolina statute requires a confession of crime in open court, or a prior conviction upon an indictment and verdict, before an attorney can be disbarred, and it takes away the common-law power to strike from the rolls: *Kane v. Haywood*, 66 N. C. 1; and this statute was pronounced constitutional in *Ex parte Schenck*, 65 Id. 353. An attorney, by his admission as such, acquires rights of which he cannot be deprived at the mere "discretion" of a court: *Fletcher v. Daingerfield*, 20 Cal. 427. "The power to disbar is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself": *Ex parte Secombe*, 19 How. 13, per Taney, C. J. An attorney convicted of crime forfeits his right to act as such, without an order of the supreme court removing him: *In Matter of E.*, 65 How. Pr. 171; *In re Niles*, 5 Daly, 465. An attorney at law is not a person holding an

"office of public trust," within the meaning of that phrase as used in the prohibitory clause of section 3, article 11, of the constitution of California; and the right to practice law is not a natural or constitutional right, but a statutory privilege, subject to the control of the legislature: *Cohen v. Wright*, 22 Cal. 293. The supreme court of the United States holds that a proceeding to disbar an attorney is not a criminal proceeding; and that it is not intended for punishment, but to protect the court from the official ministrations of persons unfit to practice as attorneys therein: *Ex parte Wall*, 107 U. S. 265; S. C., 13 Fed. Rep. 814. The state courts, however, hold that such a proceeding, while not strictly a criminal prosecution, is of that nature; that it is a criminal or quasi criminal case: *Matter of Batus*, 28 Mich. 507; *State v. Tunstall*, 51 Tex. 81; *Thomas v. State*, 58 Ala. 365; note to *People v. Turner*, 52 Am. Dec. 302; that the provisions of the statute for disbarment of attorneys are penal in their nature: *Klingensmith v. Kepler*, 41 Ind. 341; *In Matter of —*, 1 Hun, 321; and should be strictly construed: *Klingensmith v. Kepler*, 41 Ind. 341; *Thomas v. State*, 58 Ala. 365. In Alabama the statutory provisions for removing attorneys are directed against licensed attorneys only: See case last cited.

CAUSES FOR DISBARMENT. — An attorney was disbarred where the evidence showed that he was guilty of the charge of altering a receipt: *In re Serfuss*, 9 Atl. Rep. 674; that he maliciously charged in his pleadings, as material facts, that another attorney in the action offered, and the judge who tried the cause accepted, a bribe for the rendition of an unwarranted judgment; that both induced a witness before a grand jury, by whom these facts were investigated, to commit perjury; and that both corruptly induced the prosecuting attorney to enter a *nolle prosequi* to the indictments resulting from such investigation, without probable cause; and the materiality of the facts were held to be no privilege on the question as to whether his attorney's license should be revoked: *People v. Green*, 13 Id. 514; that he subscribed to an affidavit containing false statements in a matter of a pre-emption claim filed in a land-office, and which were known by him to be false, though no formal oath was administered in the affidavit; while the attorney in such a case may not be guilty of perjury, his act is professional misconduct; and his claim that he did not know the requirements of the land law, or that an oath was necessary, and that he did not read the paper, and signed it innocently at the request of the land-officer, will not prevail to establish a mistake, if the surrounding circumstances show that he must have understood the matter, and was interested in getting it through: *In re Keegan*, 31 Fed. Rep. 129; that he participated in an unlawful, tumultuous, and riotous gathering, advised and encouraged such gathering, and assisted therewith in taking a prisoner from jail and hanging him, although no complaint under oath had been filed against him: *In re Wall*, 13 Id. 814; S. C., 107 U. S. 290; 2 Sup. Ct. Rep. 569; that he disobeyed an order of court to pay over to his client money collected in a suit instituted in the court making such order: *Jeffries v. Laurie*, 27 Fed. Rep. 195; *contra*, *Guilford v. Sims*, 13 Com. B. 370, cited *infra*; that he fraudulently appropriated his client's money collected by him; or wrongfully retains and fails to pay it over: *In re Treadwell*, 7 Pac. Rep. 724; S. C., 67 Cal. 353; *People v. Palmer*, 61 Ill. 255; *People v. Ryalls*, 8 Col. 332; *Ex parte Brown*, 2 Id. 553; *People v. Smith*, 3 Caines, 221; *Matter of Bleakley*, 5 Paige, 311; *Hynman v. Washington*, 2 McCord, 493; *Dawson v. Compton*, 7 Blackf. 421; but a mere non-payment of money by an attorney, pursuant to an order and rule of court, unaccompanied by special circumstances justifying such a course, is no ground for disbarring him: *Guilford*

v. *Sims*, 13 Com. B. 370; that he withheld from his client, and his client's administrator, money collected by him: *People v. Cole*, 84 Id. 327; that he practiced deceit in his character as attorney, although not in a suit pending in the court: *State v. Burr*, 28 N. W. Rep. 261; *Matter of Peterson*, 3 Paige, 510; *People v. Goodrich*, 79 Ill. 148; that he threatened, out of court, to personally chastise the judge concerning his judicial action in a certain cause, and applied abusive and insulting language to him as he was driving along the street: *People v. Green*, 3 Pac. Rep. 65; S. C., 3 Id. 374; 7 Col. 237; 49 Am. Rep. 361; *Bradley v. Fisher*, 13 Wall. 335; that he assaulted a judge for his action as such: *Beene v. State*, 22 Ark. 149; that he advertised to procure divorces without publicity, and for causes not known to the law: *People v. Goodrich*, 79 Ill. 148; that he did not possess a good moral character, had violated his professional oath and duty, and had been convicted of a felony: *Penobscot Bar v. Kimball*, 64 Me. 140; *Strout v. Proctor*, 71 Id. 288; that he had been guilty of a gross abuse of confidence: *In Matter of Wool*, 36 Mich. 299; that he, being employed by a husband to bring a divorce, entered into collusion with the wife to manufacture evidence by taking her to a hotel, sleeping there all night under assumed names, having agents to watch, and upon whose testimony the divorce was granted: *In re Gale*, 75 N. Y. 526; that he substituted the name of his client for his own in an affidavit to procure alimony, and thus procured an order of court, and obtained money from the husband of his client: *People v. Leary*, 84 Ill. 190; that he obtained money by false pretenses in matters intrusted to him: *People v. Ford*, 54 Id. 520; that he embezzled taxes: 58 N. H. 5; S. C., 42 Am. Rep. 555.

A weak-minded man, laboring under the hallucination that he had committed a crime, fled to Tennessee, and there concealed himself, but was discovered by certain detectives and officers, who, supposing he was in fact a criminal, had him arrested and committed to jail in the hope of obtaining a reward. They took an attorney at law into their confidence, and acting with him, and under his advice, after learning that the supposed criminal was in fact innocent, procured his release fraudulently, and by preparing false and illegal papers, and after receiving and dividing large sums of money sent to their prisoner by relatives, carried him in disguise to New York and shipped him to Liverpool, where he was found by his relatives and brought home. For this conduct the attorney was disbarred and his name stricken from the rolls: *In re Snyder*, 24 Fed. Rep. 910. So a member of the bar who appears in court armed with a deadly weapon is not only guilty of a contempt of court, but also of professional misconduct, and should be suspended or disbarred: *Sharon v. Hill*, 24 Id. 726. So should an attorney be disbarred where he proposes by letter to his client to improperly use his personal influence with a judge in behalf of his client; to control newspapers, and induce them to attack the judge; and to attempt to secure pledges in favor of his client from persons who were candidates for the position of railroad receiver; but the evidence against him should be clear: *Ex parte Cole*, 1 McCrary, 405. So where he is guilty of other corrupt and fraudulent conduct: *People v. Goodrich*, 79 Ill. 148; *State v. Burr*, 19 Neb. 593; *In re Temple*, 33 Minn. 343; *Matter of Peterson*, 3 Paige, 510. It should be suspension or disbarment, according to the grade of the offense: *Bryant's Case*, 24 N. H. 149. An attorney who conspires to get an opposing attorney drunk, in order to gain an advantage in a cause about to come on, is liable to expulsion from the bar for his act: *Dickens's Case*, 67 Pa. St. 169; S. C., 5 Am. Rep. 420. An attorney in proceedings for the probate of a will had taken out a commission for the examination of a witness, prepared answers for such witness to the inter-

rogatories and cross-interrogatories, furnished them to the witness who had received various sums of money from him, read a part of the answers to the commissioners, left the rest for the witness to repeat, and thus got the answers before the surrogate as honest testimony. This was held sufficient to authorize an order disbaring the attorney, even though the answers were not shown to be false, and it appeared that the attorney believed them to be true: *In Matter of Eldridge*, 82 N. Y. 161; S. C., 37 Am. Rep. 558. Where criminal proceedings were instituted by a client against his attorney for embezzlement of the client's funds, the fact that a settlement was made, and that the client consented to a *nolle prosequi* after he had also taken steps to disbar the attorney, were held to be no objection to the disbarment: *In re Davies*, 93 Pa. St. 116; S. C., 39 Am. Rep. 729; 13 Phila. 65; and the same ruling was made *In Matter of an Attorney*, 86 N. Y. 563, where the attorney had received a pardon for the offense in question. So an attorney was disbarred where the evidence showed that he wrongfully, and without authority of law, procured a United States commissioner to issue a pretended writ of *habeas corpus*, whereby a prisoner convicted of murder, and under sentence of death, was admitted to bail, and thus allowed and caused to escape: *State v. Burr*, 19 Neb. 593; that he received from the files of the court the papers in a divorce suit instituted by his wife against him, and failed to account for them; and that he accused the chancellor in open court of being one of an alleged combination against him to control his property; and persisted in his charge without offering any proof of it: *State v. Maxwell*, 19 Fla. 31; that he was convicted of crime: *McCarthy's Case*, 42 Mich. 71; *State v. Chapman*, 11 Ohio, 430; that he was prosecuted by indictment or information, and that his guilt was confessed or found by a jury: *Walker v. Commonwealth*, 8 Bush, 86; that he obliterated a record, and antedated a writ to avoid the effect of the statute of limitations: *Ex parte Brown*, 1 How. (Miss.) 303; that he was guilty of subornation of perjury: *State v. Holding*, 1 McCord, 379; that his moral character had become so bad that no reliance could be placed upon his word or his oath; *In re Percy*, 36 N. Y. 651; that he represented the plaintiff in a divorce suit without authority: *Dillon v. State*, 6 Tex. 55; that he accepted a challenge to fight a duel, or that he fought a duel in another state and killed his antagonist: *Smith v. State*, 1 Yerg. 228; that he without authority instructed counsel to appear for parties interested in money in court, and to consent to its payment out of court: *Wheatley v. Bastow*, 7 DeGex, M. & G. 558; that he, acting professionally in a trust, improperly induced his co-trustee, who was his client, to sell out the trust fund, which was received by the attorney and applied to his own use: *In re Chandler*, 22 Beav. 253.

Courts have power without any special statutory provision to strike from the rolls an attorney guilty of disloyalty or treasonable acts: *Cohen v. Wright*, 22 Cal. 293; and in the exercise of their general power, the courts at Westminster would order an attorney or solicitor to be struck off the rolls for willfully proceeding in an action not legally commenced; forging a writ; fraudulently altering a roll, record, or paper book; signing without authority pleadings at law or in equity, in another's name or in a fictitious name; procuring a witness to keep out of the way on a trial; conspiring to pack a jury; or hiring straw-bail. So also would they disbar after a conviction for felony, the conviction itself being considered to render the party unfit to belong to the profession. The same doctrine has been applied to misdemeanors as to sedition, extortion, and conspiracy; but in these offenses the circumstances should appear, so that it may be seen whether they are of an aggravated

nature, as convictions sometimes take place where there is very slight culpability: Weeks on Attorneys, pp. 147, 148, and cases there cited. An attorney may also be disbarred for many other acts of professional misconduct: *Id.* 151, 152. In many of the states there are statutory provisions governing the removal and suspension of attorneys, but courts have inherent power to purge the profession of unworthy members without the aid of a statute, and may remove or suspend an attorney for other causes than those mentioned in the statute, which is not to be construed as restrictive of the general power of the court over its affairs: *In re Mille*, 1 Mich. 392. But *Ex parte Smith*, 28 Ind. 47, seems to hold a contrary doctrine.

ACTS NOT CONSTITUTING SUFFICIENT CAUSE FOR DISBARMENT. — A young and inexperienced attorney made a false affidavit in a proceeding before the general land-office at Washington, to obtain a patent, relying on the assurance of an older lawyer that he could properly make such affidavit, which it was claimed he believed to be technically true when he made it; and it was held in a California court, in a proceeding to disbar, that the offense, not having been committed within the jurisdiction of the court, was to be considered as a moral offense only, and, under the circumstances, might be attributed to youth and inexperience. The proceedings were therefore dismissed, as the party who instituted them did not object: *In re Knott*, 12 Pac. Rep. 780. The application to strike the name of an attorney from the rolls should be denied where the evidence is conflicting as to whether he received the information which he disclosed, and which was alleged as misconduct: *People v. Barker*, 56 Ill. 299. Ignorance of the law is not a good cause for disbarment: *Bryant's Case*, 24 N. H. 149. An attorney cannot be disbarred for refusing in the presence of the court to make answer in writing to a rule, upon the ground of punishing the refusal as a contempt: *Ex parte Robinson*, 19 Wall. 505; or for commencing several *qui tam* actions for the purpose of revenge: *Ex parte Warren*, 1 Har. & W. 113; or for offering to compromise such actions after he had brought them: *Smith v. Gillett*, 3 Dowl. 364; or because he had served no regular clerkship prior to his admission, where no misconduct or malpractice had been imputed to him afterwards: *In re Page*, 7 Moore, 572. A member of a firm who did not participate in the receipt or wrongful appropriation of money should not be disbarred. This penalty is applicable only to the party derelict in duty and personally guilty of wrong: *Porter v. Vasce*, 14 Lea, 629. And where a judgment has been recovered against two attorneys as partners, for money collected by them and not paid over to their client, and where the partnership has been dissolved, and the debts due the firm have been assigned to one of the partners, who has assumed to pay the judgment, a failure to collect and apply such debts to the payment of the judgment will not authorize the suspension of the attorney to whom the accounts have been assigned: *Kepler v. Klingensmith*, 50 Ind. 434. The money collected by the attorney on claims due the firm would not be the money of the client; and the cause, so far as it sought a judgment for the money collected and not paid over by the firm, ended in the judgment against them: *Id.* A statute authorizing the court to remove an attorney who has been convicted of a felony or misdemeanor, and providing that "the record of his conviction shall be conclusive evidence," contemplates a conviction in a court of record; and the docket of a justice of the peace is not conclusive. The motion for disbarment was denied: *In Matter of Granger*, 15 Nev. 56. Some courts have disbarred attorneys for wrongful acts and conduct outside their professional duties; but such cases are put upon the ground that there is such a want of integrity and professional fitness displayed in their

conduct other than in the capacity of attorney as shows them to be unsafe and unfit to practice law: *State v. Winton*, 5 Pac. Rep. 337. Thus an attorney was disbarred for assisting at a lynching: *Ex parte Wall*, 107 U. S. 265; S. C., 13 Fed. Rep. 814; note to *Delano's Case*, 42 Am. Rep. 557. But the courts generally have made a distinction between acts and conduct as an attorney and those as a person: Note to *Ex parte Steinman*, 40 Am. Rep. 642; and unless the attorney shows such a want of professional honesty as renders him unworthy of public confidence, or has such a bad character that he is an unsafe and unfit person to be intrusted with the powers of the profession, he will not be disbarred: *Baker v. Commonwealth*, 10 Bush, 592. As expressed by Mr. Justice Field, in his vigorous dissenting opinion to *Ex parte Wall*, 107 U. S. 306, and in which he made an elaborate review of cases: "When the proceeding to disbar an attorney is taken for misconduct outside of his profession, the inquiry should be confined to such matters, not constituting indictable offenses, as may show him unfit to be a member of the bar; that is, as not possessing that integrity and trustworthiness which will insure fidelity to the interests intrusted to him professionally, and to the inspection of any record of conviction against him for a felony or a misdemeanor involving moral turpitude. It is not for every moral offense which may leave a stain upon character that courts can summon an attorney to account. Many persons eminent at the bar have been chargeable with moral delinquencies which were justly a cause of reproach to them; some have been frequenters of the gaming-table, some have been dissolute in their habits, some have been indifferent to their pecuniary obligations, some have wasted estates in riotous living, some have been engaged in broils and quarrels disturbing the public peace; but for none of these things could the court interfere, and summon the attorney to answer, and if his conduct should not be satisfactorily explained, proceed to disbar him. It is only for that moral delinquency which consists in a want of integrity and trustworthiness, and renders him an unsafe person to manage the legal business of others, that the courts can interfere and summon him before them. He is disbarred in such case for the protection both of the court and of the public." Indulgence in vices affecting to some extent the moral character, but not personal or professional integrity, is not a sufficient ground for disbarment: *Baker v. Commonwealth*, 10 Bush, 592; note to *Ex parte Steinman*, 40 Am. Rep. 642; *People v. Allison*, 68 Ill. 151. It has thus been held that an attorney cannot be disbarred because he participated in making pretended gifts as a means of giving notoriety to an exhibition innocent in itself: *Dickens's Case*, 67 Pa. St. 169; S. C., 5 Am. Rep. 420; or because he, being also the editor of a newspaper, published in it a libelous article charging a judge with prostituting the machinery of justice to serve party purposes in a certain case: *Ex parte Steinman*, 95 Pa. St. 220; S. C., 40 Am. Rep. 637, and note 642. So an attorney is not liable to disbarment for breach of a private trust: *People v. Appleton*, 105 Ill. 474; S. C., 44 Am. Rep. 812; and is not liable to disbarment at the suggestion of a stranger for not paying over money collected, if the party to whom the money belonged was satisfied: *People v. Allison*, 68 Ill. 151. Where the acts charged against an attorney are not done in his official character, and are indictable and not confessed, there has been a diversity of practice on the subject. In some cases it is held that there must be a regular indictment and conviction before the court will disbar: *Ex parte Steinman*, 95 Pa. St. 220; S. C., 40 Am. Rep. 637; *Anonymous*, 7 N. J. L. 162; *State v. Foreman*, 3 Mo. 602; *Ex parte Fisher*, 6 Leigh, 619; *State v. Chapman*, 11 Ohio, 430; *Beene v. State*, 22 Ark. 149; in others, such

previous conviction is deemed unnecessary: *Ex parte Wall*, 107 U. S. 265; *State v. Winton*, 5 Pac. Rep. 337; S. C., 11 Or. 456; 50 Am. Rep. 496; *In re Treadwell*, 7 Pac. Rep. 724; *Stephens v. Hill*, 10 Mees. & W. 28; *Ex parte Burr*, 2 Cranch C. C. 379; 1 Wheel. Cr. Cas. 503; *In Matter of* —, 5 Barn. & Adol. 1088; *Fields v. State*, Mart. & Y. 168; *Smith v. State*, 1 Yerg. 228; *Perry v. State*, 3 G. Greene, 550; *In re Percy*, 36 N. Y. 651; *Penobscot Bar v. Kimball*, 64 Me. 140; *Delano's Case*, 58 N. H. 5; S. C., 42 Am. Rep. 555, note 557-565; *Ex parte Walls*, 64 Ind. 461; *Matter of Wool*, 36 Mich. 299; *People v. Appleton*, 105 Ill. 474; S. C., 44 Am. Rep. 812. Many of these cases, *pro* and *con*, are reviewed in *Ex parte Wall*, 107 U. S. 265.

SUSPENSION. — The minor punishment of suspension for a certain time is often inflicted for lighter offenses. Thus an attorney was suspended from practice for two years for fraud and deceit, involving money matters, practiced towards his clients, with the privilege of moving for a modification within six months from the date of suspension, upon showing that the claim against him had been paid; and the suspension was to be perpetual, and the attorney's license revoked, unless he made such motion before two years: *Stemmer v. Wright*, 54 Iowa, 164; S. C., 6 N. W. Rep. 181. An attorney was suspended for six months for affixing false dates to certain jurats and acknowledgments: *In the Matter etc. of Arcander*, 26 Minn. 25; S. C., 1 N. W. Rep. 43; for one year, when, in moving for the admission of a person as a member of the bar, he concealed the fact, within his own knowledge, that the board of examiners had reported adversely upon such application: *In Matter of Deringer*, 12 Phila. 217; for six months, for having abstracted from the files in the office of a prothonotary a receipt attached to a *feri facias*: *In re Gates*, 2 Atl. Rep. 214; for five years, for receiving money from a client to apply to certain purposes, and retaining it, and not applying it as agreed: *In re Moore*, 13 Pac. Rep. 855; for a short period, for assisting counsel who inserted slanderous and malicious charges against a judge in his pleadings: *People v. Green*, 13 Id. 514; for three months, for drawing an indictment, while district attorney, which was returned by the grand jury a "true bill," and afterwards appearing as counsel for the defendant, when his term of office had expired: *People v. Spencer*, 61 Cal. 128. So an attorney for the city and county of San Francisco, who has the management of all its cases, is guilty of unprofessional conduct, and violation of his oath as attorney and counselor at law, if, after his office has expired, he accepts a retainer in one of the city cases of which he had charge on the side opposed to the city, though he performs no services for this retainer other than that he agrees not to disclose a point arising in the case, and within his knowledge, which would be favorable to the city, and probably fatal to the suit of the other party: *In re Coudery*, 10 Pac. Rep. 47. In this case the attorney was suspended for six months. And in the case of *In re Temple*, 33 Minn. 343, S. C., 23 N. W. Rep. 463, the attorney was suspended for six months for not accounting to his client, nor repaying the amount received by or for him upon a note in his hands for collection. But an attorney cannot be suspended from practice by the default of his partner, and converting the money of a client without his knowledge: *Klingensmith v. Kepler*, 41 Ind. 341; *Kepler v. Klingensmith*, 50 Id. 434; nor can he be suspended for neglecting to appear before an examiner to testify. His contempt for not obeying a subpoena can only be punished by fine: *Commonwealth v. Newton*, 1 Grant Cas. 453; *People v. Turner*, 1 Cal. 143; S. C., 52 Am. Dec. 295, 300.

PRACTICE. — An order to show cause is the improved mode of proceeding against attorneys for disbarment: *Ex parte Wall*, 107 U. S. 265; S. C., 13

Fed. Rep. 814; *In re Percy*, 36 N. Y. 651; *In Matter of —*, 5 Barn. & Adol. 1088; *Stephens v. Hill*, 10 Mees. & W. 28; *In re Davies*, 93 Pa. St. 116; S. C., 39 Am. Rep. 729; 13 Phila. 65; *Winkelman v. People*, 50 Ill. 449; *In re Orton*, 54 Wis. 379; *Ex parte Bradley*, 7 Wall. 364; *In re Wool*, 36 Mich. 299; *People v. Green*, 3 Pac. Rep. 65; *In re Serfuss*, 9 Atl. Rep. 674; *Anonymous*, 22 Wend. 656; *Smith v. State*, 1 Yerg. 228; *Beene v. State*, 22 Ark. 149; *People v. Palmer*, 61 Ill. 255; *Penobscot Bar v. Kimball*, 64 Me. 140; *Saxton v. Stowell*, 11 Paige, 526. In any case, the power of the court should not be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. A judgment disbarring an attorney without this is erroneous: *Bradley v. Fisher*, 13 Wall. 335; *Peyton's Appeal*, 12 Kan. 398; *People v. Turner*, 1 Cal. 143; S. C., 52 Am. Dec. 295; *Ex parte Robinson*, 19 Wall. 506; *Penobscot Bar v. Kimball*, 64 Me. 140; and from it an appeal is allowed in some of the states: *Peyton's Appeal*, 12 Kan. 398; *Turner v. Commonwealth*, 2 Met. (Ky.) 619; *Klingensmith v. Kepler*, 41 Ind. 341; *Kepler v. Klingensmith*, 50 Id. 434; *In re Orton*, 54 Wis. 379; *Walls v. Palmer*, 64 Ind. 493; *Ex parte Tripp*, 66 Id. 531; *Winkelman v. People*, 50 Ill. 449; *In Matter of —*, 86 N. Y. 563; *Dickinson v. Dustin*, 21 Mich. 561; but no appeal is allowed in Texas against a defendant attorney who successfully resisted proceedings to disbar him in the lower court: *State v. Tunstall*, 51 Tex. 81. In *Ex parte Steinman*, 95 Pa. St. 220, it is held that courts have jurisdiction and power upon their own motion, without formal complaint or petition, in a proper case, to strike the name of an attorney from the roll, provided he has had reasonable notice, and an opportunity to be heard; but under the revised statutes of New York, disbarment upon motion, without the filing of regular charges, is held to be unauthorized: *Saxton v. Stowell*, 11 Paige, 526; and the usual practice is to make specific charges in writing against the attorney, so that he can answer them, when a rule to show cause will issue if a proper case is presented: *Beene v. State*, 22 Ark. 149; *In re Mills*, 1 Mich. 392; *People v. Palmer*, 61 Ill. 255; *Dickinson v. Dustin*, 21 Mich. 561; *Anonymous*, 22 Wend. 656. He can then move to quash or answer, when evidence will be heard: *Smith v. State*, 1 Yerg. 228. The papers should be properly presented, and served upon the attorney: *In re Percy*, 36 N. Y. 651. Where the proceeding to disbar an attorney is by order to show cause, the charges against him should clearly appear in the order itself, or in some instrument appended thereto, or at least on file; and even when the charges are to be supported by pleadings filed by such attorney, the charges themselves should be distinctly specified: *In re Orton*, 54 Wis. 379. Other persons besides "creditors" may institute proceedings to disbar an attorney: *People v. Palmer*, 61 Ill. 255; the attorney may defend by affidavits: *In re Wool*, 36 Mich. 299; and though not strictly regular to grant a rule to show cause without an affidavit making charges against the attorney, the want of such affidavit does not, under all circumstances, render the proceeding void as *coram non judge*: *Ex parte Wall*, 107 U. S. 265; S. C., 13 Fed. Rep. 814. The circuit court may properly, on its own motion, require an attorney to show cause why he should not be disbarred, when pleadings filed by him appear to require an investigation of that character: *In re Orton*, 54 Wis. 379. But when an attorney is charged with malpractice, or offenses not committed within the presence and personal knowledge of the court, the correct mode of proceeding against him is by complaint or information made on the oath of some individual: *Walker v. Commonwealth*, 8 Bush, 86. In Indiana, a proceeding to disbar an attorney must conform to the requirements of the code, and an order of disbarment

where the code is not complied with is void, and an appeal lies: *Ex parte Tripp*, 66 Ind. 531. Informations to remove an attorney from the bar must disclose with certainty the facts of misconduct, and that the defendant is amenable to the proceeding: *Thomas v. State*, 58 Ala. 365; *State v. Burr*, 28 N. W. Rep. 261; *Ex parte Cole*, 1 McCrary, 405. In a regular complaint against an attorney, charges cannot be received and acted on unless made on oath. But he may waive this; and the court will then proceed to investigate the charges upon testimony regularly taken under oath: *Ex parte Burr*, 9 Wheat. 529. The court should allow a continuance, that defendant may get absent witnesses, in a proper case, and to refuse it is error: *Walker v. State*, 4 W. Va. 749.

The method of pleading and practice in a proceeding to disbar an attorney is not controlled by the same rules, in every respect, that prevail in ordinary common-law actions. Such proceeding is special and of a summary character. One of the respects in which it thus differs is that a replication to the answer to the rule to show cause is unknown to such proceeding. Upon the coming in of such answer the motion of the movant is to make the rule absolute, and that of the respondent is to discharge the rule, and the introduction of testimony is proper without a replication: *State v. Maxwell*, 19 Fla. 31. On an information against an attorney at law, he can only be tried on the charges contained in the information. Other charges in the affidavits filed with it will not be considered: *People v. Allison*, 68 Ill. 151. Informations against attorneys are disfavored after great lapse of time from the commission of the acts complained of: *In Matter of —*, 2 Barn. & Adol. 766; *People v. Allison*, 68 Ill. 151. A different rule prevails in the federal courts from that in some of the state courts. It is there held that formal allegations, making specific charges of malpractice or unprofessional conduct, are not essential as a foundation for proceedings against attorneys. All that is requisite to their validity is that when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or injustice, is a matter of judicial regulation: *Randall v. Brigham*, 7 Wall. 523. An attorney cannot be disbarred for misbehavior in his office of attorney generally, upon the return of a rule issued against him for contempt of court, and without opportunity of defense or explanation to the first-named charge: *Ex parte Bradley*, 7 Id. 364. A judgment of disbarment should specify the particular charges upon which an attorney's guilt is pronounced: *Perry v. State*, 3 G. Greene, 550; if not, another court will not disbar him upon an affidavit merely stating that he was disbarred in the original court, without showing the cause thereof: *In re Hague*, 7 Moore, 64. But otherwise where the cause of disbarment is shown: *In re Smith*, 4 Id. 319. Where an attorney has had due notice of the proceedings for his disbarment, appears therein, and neither makes any objection to the mode of procedure nor asks for any other, he cannot object on appeal that it was not the one he had a right to demand: *In Matter of —*, 86 N. Y. 563. In such proceedings, where he denies the charges, the common-law rules of evidence apply. The accused is not to be tried upon affidavits, but is entitled to confront the witnesses and subject them to cross-examination, and to invoke the well-settled rules of evidence: *In Matter of Eldridge*, 82 N. Y. 161; S. C., 37 Am. Rep. 558; but this right is a personal one, and he may waive it: *In Matter of —*, 86 N. Y. 563. In Indiana, he may demand that the issues raised shall be tried by a jury: *Reilly v. Cavanaugh*, 32 Ind. 214; but not in Illinois: *People v. Good-*

rich, 79 Ill. 148; and in Iowa and Kansas he may get a change of venue where the presiding judge is prejudiced against him: *Peyton's Appeal*, 12 Kan. 398; *State v. Clarke*, 46 Iowa, 155. An appeal, however, from a judgment of a justice's court convicting an attorney of embezzlement, operates as a suspension of the judgment, and proceedings taken for the disbarment of the attorney, based upon such judgment, and instituted pending the appeal, are premature and should be dismissed: *People v. Treadwell*, 66 Cal. 400. Where the supreme court has, by its judgment, disbarred an attorney, a motion for a new trial will not be heard by it: *In re Tyler*, 13 Pac. Rep. 169. Where an attorney in his pleadings before a federal court makes malicious charges and attacks upon a state judge and state attorney, the state court has jurisdiction to consider the question of his disbarment: *People v. Green*, 13 Id. 514.

CONTEMPTS—EFFECT OF DISBARMENT AS TO OTHER COURTS.—An attorney should not be suspended or removed for contempt unless the offense is of so gross and serious a nature as to render him unworthy of his office: *Watson v. Citizens' Savings Bank*, 5 S. C. 159; *Jackson v. State*, 21 Tex. 668; *In re Woolley*, 11 Bush, 95; *Commonwealth v. Newton*, 1 Grant Cas. 453; *People v. Green*, 3 Pac. Rep. 374; *Ex parte Smith*, 28 Ind. 47; note to *People v. Turner*, 52 Am. Dec. 302. Thus he cannot be suspended for disobeying a subpoena: *Commonwealth v. Newton*, 1 Grant Cas. 453; or for receiving his fees from a corporation after the court has restrained such corporation from paying out its funds: *Watson v. Citizens' Savings Bank*, 5 S. C. 159; and in Texas, applying abusive and opprobrious epithets to a judge in vacation cannot be considered "a contempt involving fraudulent or dishonorable conduct or malpractice" within the meaning of the statute: *Jackson v. State*, 21 Tex. 668; but as to this, see *People v. Green*, 3 Pac. Rep. 374, where the distinction between proceedings for disbarment and those for contempt was clearly pointed out in a case where a lawyer insulted a judge upon the street on account of his judicial action. A contempt may be a ground for disbarment; but a cause of disbarment need by no means constitute a contempt. No punishment can be inflicted upon an attorney for an ordinary contempt merely, unaccompanied by aggravating circumstances, except fine and imprisonment: Note to *People v. Turner*, 52 Am. Dec. 302; *People v. Green*, 3 Pac. Rep. 374; *Commonwealth v. Newton*, 1 Grant Cas. 453; *Ex parte Smith*, 28 Ind. 47. But for an open, notorious, and public insult to a court, for which an attorney contumaciously refuses in any way to atone, he may be both fined for contempt and disbarred: *In re Woolley*, 11 Bush, 95. So may he be both disbarred and committed to jail for contempt in persistently disobeying an order to pay over to his client money collected in a suit instituted in the court thus exercising its power: *Jeffries v. Laurie*, 27 Fed. Rep. 195. An attorney disbarred for contempt has a right of appeal: See note to *Clark v. People*, 12 Am. Dec. 186. The court will not punish by disbarment for contempt when the act has not been committed in their presence, and there is another mode of punishment: *In re Hirst*, 9 Phila. 216; nor will they punish by disbarment for contempts committed in other courts: *Ex parte Tillinghast*, 4 Pet. 108; *Ex parte Bradley*, 7 Wall. 364. An attorney removed by the court of chancery in New York is deprived of the right to practice as an attorney in any of the courts of record in that state: *In re Peterson*, 3 Paige, 510. The effect of a removal by the supreme court of a state is the same: *State v. Burr*, 19 Neb. 593; S. C., 28 N. W. Rep. 261. Disbarred attorneys in Michigan can no longer appear as attorneys in any court of record of that state, or represent any person in court as attorney,

"agent," or otherwise: *Cobb v. Judge of Superior Court, etc.*, 43 Mich. 289. But where a court of inferior and co-ordinate jurisdiction merely suspends an attorney from practice, it does not have the effect of suspending him from practice in other inferior courts, or in the supreme court: *Winkelman v. People*, 50 Ill. 449. Where an attorney has been suspended for a term of years by one court for contempt, it is not compulsory on other courts of co-ordinate jurisdiction, as in the case of striking from the rolls, to suspend him; but they will look into the affidavits, and exercise their own discretion: *In re De Medina*, 6 L. T., N. S., 536.

RESTORATION, AND OTHER MATTERS. — If an attorney's name be stricken from the rolls for malpractice, he may afterwards be readmitted on motion, and on a proper showing. Striking from the rolls is not necessarily a perpetual disability; it is sometimes meant merely as a temporary punishment, and regarded in the light of a temporary suspension only, unless otherwise stated in the decree of disbarment. But the applicant for readmission in such cases must satisfy the court that he ought to be restored, and that no objection to him remains. It appears to be a matter left, to a great extent, to the sound discretion of the court. *Mandamus* is the appropriate remedy to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter. This is the regular practice in the federal courts, and apparently the necessary one, as neither error nor appeal will lie in the United States courts in such cases. Without the writ of *mandamus* in those courts, however flagrant the wrong committed against attorneys in disbarring them, they would be destitute of redress: *Ex parte Wall*, 107 U. S. 265; S. C., 13 Fed. Rep. 814; *Ex parte Bradley*, 7 Wall. 364; *Ex parte Robinson*, 19 Id. 505. But a clear case of grossly irregular and unjust conduct must be shown: *Ex parte Burr*, 9 Wheat. 529; and it will not issue where there was jurisdiction in the court below: *Ex parte Secombe*, 19 How. 9. So in a clear case of excess of jurisdiction in an inferior state court, *mandamus* has been held the proper remedy to restore a disbarred attorney's name to the rolls: *People v. Dowling*, 55 Barb. 197; S. C., 37 How. Pr. 394; *People v. Turner*, 1 Cal. 143; S. C., 52 Am. Dec. 295, note 302; note to *Dane v. Derby*, 89 Am. Dec. 732, 740; *Withers v. State*, 36 Ala. 252; *State v. Maxwell*, 19 Fla. 31; but *mandamus* will not issue in the state courts for trifling reasons, and where there is another adequate remedy: *People v. Dowling*, 55 Barb. 197; S. C., 37 How. Pr. 394. And it will not lie to compel a court to alter a punishment of contempt, if authorized by law: *Ex parte Burr*, 4 Wheat. 529; *Ex parte Secombe*, 19 How. 9. The remedy by *mandamus* has been denied in Massachusetts: *Randall's Case*, 11 Allen, 473; in Pennsylvania: *Commonwealth v. Judges etc.*, 1 Serg. & R. 187; *McLaughlin v. District Court*, 5 Watts & S. 272; and in Indiana: *Ex parte Walls*, 73 Ind. 95; *Walls v. Palmer*, 64 Id. 493; but we have seen that an appeal will lie in the latter state. That *mandamus* is improper, and that *certiorari* in the nature of a writ of error will lie where there is no appeal, see *Ex parte Biggs*, 64 N. C. 202. In Colorado, the supreme court will issue a writ of *mandamus* to compel the judge of a district court to recognize a district attorney; but not if, upon application for the writ, the court is equally divided in opinion: *People v. Hallett*, 1 Col. 352. The Indiana practice upon application for readmission is well stated in *Ex parte Walls*, 73 Ind. 95. The applicant for readmission is not entitled to a jury trial: Id. He must show his qualifications, and let the court determine upon their sufficiency: Id. If an attorney is stricken from the roll, a pardon by an executive officer will not entitle him to restoration: *Matter of Browne*, 2 Col. 553; *In Matter of E.*, 65 How. Pr. 171. Judges are not liable to a civil action for damages for remov-

ing attorneys from the bar. The act is a judicial one: *Bradley v. Fisher*, 13 Wall. 335. An accusation to remove an attorney, signed by C. and P., is insufficiently verified, where the affidavit is made upon the information and belief of H., without stating why it was not made by one of the informants: *In Matter of Hotchkiss*, 58 Cal. 39. The subject of disbarment of attorneys is discussed in the notes to *Ex parte Steinman*, 40 Am. Rep. 642; *Delano's Case*, 42 Id. 557-565; *In re Houghton*, 8 Pac. Rep. 57-59; *In re Wall*, 13 Fed. Rep. 820-823; *State v. Burr*, 28 N. W. Rep. 269-271; *In re Gates*, 2 Atl. Rep. 215-217. The note to each of the last four authorities cited is the same. It is also treated in *Weeks on Attorneys*, secs. 80-83.

CLONTS v. RITCH.

[12 FLORIDA, 683.]

JUDGMENT IS GENERAL LIEN UPON REAL ESTATE, WHICH COURT OF LAW CANNOT CONTROL by directing execution of the judgment against specific portions of the property of the defendant in execution, to the exclusion of other portions equally subject to the general lien, on account of equities claimed to exist in favor of a person not a party to the judgment or execution. The only remedy is in a court of equity, where all interests may be heard, and all rights adjusted.

WRIT of error to review a judgment. M. A. Clonts, sheriff, etc., was plaintiff in error, and H. L. Ritch was defendant in error. The facts are stated in the opinion.

E. M. L'Engle, for the plaintiff in error.

S. M. G. Gary, for the defendant in error.

By Court, WESTCOTT, J. Adam L. Eichelberger is indebted to H. L. Ritch, the petitioner in the court below, in the sum of twelve thousand dollars, which is secured by mortgage upon certain real estate of Eichelberger in Marion County. At the date of the execution of this mortgage, it is alleged that an examination of the offices of sheriff and clerk of the county disclosed no unsatisfied executions against the mortgagor, and a certificate of the clerk to the effect that no liens existed on the property was given. There was, however, at the time, in the hands of the ex-sheriff of the county an unsatisfied execution against the mortgagor and Jacob W. Eichelberger and John B. Eichelberger, in favor of one William Royall for the sum of \$637.94. Upon this execution sundry payments had been made.

After the execution of the mortgage, upon application to the court, this execution was renewed for the balance alleged

to be due, and was levied upon the lands embraced in the mortgage to Ritch, while other executions bearing date since the date of the mortgage were levied upon other lands of Eichelberger, the defendant in execution. Upon this state of facts, Ritch, the mortgagee, files a petition in vacation before the judge of the circuit court, setting up the facts before stated, as well as that the land upon which the executions junior to the mortgage were levied is of sufficient value, not only to satisfy these executions, but as well all liens superior to the mortgage, including the execution in favor of Royall, and that the other defendants in execution, with Eichelberger, are possessed of sufficient property to satisfy the Royall execution, and prays "a rule *nisi* against Mitchell Clonts, sheriff, to show cause why said mortgaged lands have been levied upon, and why he does not levy and sell other property of the said Adam L. Eichelberger to satisfy all executions of superior lien to the said mortgage in favor of the said H. L. Ritch; and that if the said other lands be insufficient to satisfy said executions, then, and in that event, to proceed with the sale of the said mortgaged lands mentioned to satisfy the balance due thereon after the proceeds of the said sale shall be exhausted, unless also the said H. L. Ritch, or his attorney, shall fail to pay balance so found to be due as aforesaid, and that unless the said sheriff shall show to this honorable court good and sufficient cause, that the said rule *nisi* be made absolute; and that until said cause shall be shown, the said sheriff be enjoined from any proceedings which will prejudice the security of the said H. L. Ritch until the further orders of this honorable court," etc.

The judgment of the court, after demurrer, and motion to dismiss, and various proceedings which it is unnecessary to mention further than to say that they bring, in every aspect of the case, the matter of irregularity and jurisdiction to the attention of the court, was as follows:—

"Upon reading and considering the petition and answer in the above cause, it is ordered that the lands mentioned in said petition, and which are contained in the indenture of mortgage by Adam L. Eichelberger to H. L. Ritch, bearing date the 16th of March, 1866, shall not be sold to satisfy executions of superior liens to said mortgage until the proceeds of the sales of all other lands of the said Adam L. Eichelberger have been exhausted to satisfy the same, and then only in the event H. L. Ritch, his agent or attorney, shall fail to discharge

and satisfy such deficiency after said proceeds have been exhausted."

A writ of error now brings this judgment here for review, and the errors assigned involve the points whether a judge of the circuit court in vacation, sitting as a common-law judge, can make such an order or hear and determine such proceedings, as well as the propriety of the order made.

From this statement of the case the question here is, Can the judge of the circuit court, out of term, upon a petition filed against the sheriff by a mortgagee of a defendant in execution, direct the sheriff to proceed against particular portions of the property of the defendant in execution until they are exhausted, to the exclusion of certain other portions of the property which have been levied upon by the sheriff under the execution on account of certain equities which the mortgagee claims exists, and which, in his judgment, entitle him to an appropriation of the proceeds of the mortgaged premises as against the plaintiff in execution, whom he claims has a general lien against the whole estate under a judgment at law, while his is only a special lien under his deed of mortgage?

The mere statement of the proposition discloses that the sheriff, the officer who executes the process of the court in such a proceeding, is really little more than a *pro forma* party, and that the essential equities upon which the mortgagee bases his prayer for relief exist, if at all, between him and the plaintiff in execution. While this is true, the plaintiff in execution here is no party to the proceeding, and the execution of his judgment at law upon property subject to its general lien is controlled and postponed.

This judgment at law is a general lien upon the real estate of the defendant in execution at law; that general lien cannot be controlled in the manner here sought; it is universal, and a court of equity, which corrects that wherein the law on account of its universality is deficient, is the only tribunal possessed of the necessary appliances as well as power to act in such manner, which, while it protects all, sacrifices none to extend that protection.

A court of law cannot, either in term or vacation, pass such an order as this.

The defendant in error insists that the judges of the circuit courts, as courts of law, have such power under the statutes of this state.

There is no claim here that the execution issued illegally.

nor is this a proceeding instituted by the defendant in execution under the provisions of the act of February 15, 1834: Thompson's Dig. 360, sec. 1.

The only other statute which regulates the power of courts of law over their own process is the act of March 15, 1844, which provides "that the court before which an execution is returnable, or the judge in vacation, may, on application and notice to the adverse party, for good cause, upon such terms as the court may impose, direct a stay of the same, and the suspension of the proceedings thereon until the first term of the court thereafter, or until a decision can be had on the same." The "adverse party" indicated in this section is not the sheriff in such a case as this.

The section above was incidentally alluded to in the case of *Michael v. Duncan*, 7 Fla. 14, but that case involved no question except whether the act of 1844 repealed the act of 1834.

In the case of *Robinson v. Frew*, 8 Fla. 355, it was decided that under this statute "a court of law had power to afford relief where a sale was about to be had on a day not authorized by the statute which regulated the days upon which sales of property under execution were to be made." It was there remarked "that courts of law have full power to revoke, correct, restrain, or quash their own process in the course of their own ordinary jurisdiction"; and that "there is a manifest impropriety in a court of chancery interfering with the process of a court of law which is the peculiar property of that court, unless its jurisdiction is expressly claimed by equities alleged outside of and apart from the process."

Without intending to express either assent or dissent to these very general remarks, it is clear that under it, where equities are claimed and they exist, if at all, outside of and apart from the process, and arise as in this case from a mortgage held by one not a party to the process, that a court of law cannot afford relief. There is nothing decided in that case which would justify the court below in assuming the jurisdiction it did.

The necessity of all the parties in interest being before the court in this case is manifest. New parties here must be made, and the proceeding at law is not suitable or adequate to accomplish the object sought. The only remedy is in a court of equity, where all interests may be heard, and where all rights may be adjusted, if indeed the mortgagee has such equities as entitle him to such relief,—a question we do not determine.

It is ordered, adjudged, and decreed that the judgment of the court below is reversed and set aside; that the cause be remanded, with directions to dismiss the petition, without prejudice to the right of the party to file a bill in chancery against such parties, and praying such relief as he may be advised.

LIEN OF JUDGMENT ATTACHES TO WHOLE LEGAL ESTATE which debtor had when judgment was docketed: *Sandford v. McLean*, 23 Am. Dec. 773; *Roads v. Symmes*, 13 Id. 621; *Campbell v. Spence*, 39 Id. 301; *McClung v. Beirne*, 34 Id. 739.

JUDGMENT LIEN ON LAND OF DEBTOR IS SUBJECT TO EVERY EQUITY which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment; and equity will protect the equitable rights of third persons against the legal lien, and will limit such lien to the actual interest which the judgment debtor has in the estate: *Blankenship v. Douglas*, 82 Am. Dec. 608, note 612; note to *Ayres v. Duprey*, 86 Id. 670. In equity, judgments are liens on the whole of the debtor's equitable estate; and the whole is first to be applied to the elder judgment, then the whole of the residue to the junior judgment: *Haleys v. Williams*, 19 Id. 743. Judgment liens are enforced in equity in the same manner as at law: *Lawson v. Jordan*, 70 Id. 596.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

CHANCELY v. BAILEY AND CLEVELAND.

[37 GEORGIA, 532.]

UNION OF STATES IS PERPETUAL and indissoluble, and no state has the right to secede therefrom.

SUPREME COURT OF UNITED STATES is the chosen arbiter to determine such disputes and controversies as may arise between the respective states.

ULTIMATE POLITICAL SOVEREIGNTY of the government created by the federal constitution resides in the United States of America.

SOVEREIGNTY IS INDIVISIBLE AND UNALIENABLE.

POWERS GRANTED TO FEDERAL GOVERNMENT by the states, as expressed in the constitution, vest in that government, with respect to such powers, the supreme, irresistible, absolute, uncontrolled authority over the people of the respective states, so as to act efficiently and directly upon them as individuals.

STATE HAS SAME UNDENIABLE AND UNLIMITED JURISDICTION over all persons and things within its limits as any foreign nation, unless such jurisdiction was withheld or limited by the federal constitution.

SOVEREIGNTY IS THAT PUBLIC AUTHORITY which commands in civil society, and orders and directs what each citizen is to perform to obtain the end of its institution.

CONTRACT TO SERVE AS SUBSTITUTE IN WAR OF REBELLION against the United States, made by a citizen of Georgia, was null and void, and no recovery can be based thereon.

THE opinion states the facts.

Cabaniss and Peebles, for the plaintiff in error.

A. D. Hammond, for the defendants in error.

By Court, **WARNER, C. J.** This was an action brought by the plaintiff against the defendants upon a note or obligation, whereby the defendants promised, one day after date, to pay the plaintiff two thousand five hundred dollars as a substitute

for one of the-defendants in the confederate army, for the term of three years, or during the war now going on between the Confederate States and the United States of America, dated the 31st of January, 1863. Upon the trial of the case, the court below decided that the undertaking of the defendants was illegal and void, and nonsuited the plaintiff. This decision of the court below is now assigned for error here.

The argument of the counsel for the plaintiff in error is based mainly upon the ground that the state of Georgia had the lawful right to secede from the Union in 1861, and having done so, it was lawful for her people to form a new government, and to make war upon the government of the United States, and therefore the consideration for which the note in question was given was a lawful and valid consideration. This is a judicial, and not a political, question, depending for its solution upon the legal right of the state to secede from the American Union, and then to make war upon the government of the United States. This court has nothing to do with the maintenance of mere abstract political theories. Did the state of Georgia have the legal right to secede from the American Union, according to a fair legal interpretation of the constitution of the United States, to which she was one of the original parties? The first and only union formed by the sovereign independent states of America was formed on the ninth day of July, 1778, under the name and style of "The United States of America," by articles of confederation and perpetual union between the states. This union, so formed, was declared to be, by article 13 of the confederation of the United States, perpetual. In pursuance of a resolution adopted by the Continental Congress on the 21st of February, 1787, a convention was called of the several states, to be held in Philadelphia, "for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the federal constitution adequate to the exigencies of government, and the preservation of the Union." The object of calling the convention, it will be perceived, was not to form a new union, but for the preservation of the union which had been already formed, and declared to be perpetual. The several states composing "The United States of America" assembled in convention at Philadelphia, and on the seventeenth day of September, 1787, adopted the constitution of the

United States as the fundamental law of the government, which was subsequently ratified by the people of each state separately, in their sovereign capacity as states, and thus became the supreme law of the land, in accordance with the terms and provisions thereof. We have already seen that the union formed between the United States of America in 1778 was to be a perpetual union. The people of each state, therefore, acting in their sovereign capacity, declare in the most solemn form, in the preamble to the constitution, that, "We, the people of the United States, in order to form a more perfect union, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America." The evidence would seem to be incontrovertible that the union of the states, under the constitution, was intended by the framers thereof, and the several states ratifying it, to be perpetual. The object is expressly declared to be, on the face of the instrument, to form a more perfect union than that which already existed, and that union, as we have seen, was declared to be perpetual. The object and intention of the framers of the constitution was to revise the Articles of Confederation by which the first union was formed, that it might remain indissoluble forever for the benefit of themselves and their posterity. The constitution itself, as well as the declared object of its adoption, expressly negatives the legal right of separate state secession.

But it is said some of the states, before and at the time of ratifying the constitution, declared that the right of secession was reserved to the state. Be that as it may, the reply to that argument is, that no such reservation was incorporated into the constitution; no terms of that or like character are to be found in the instrument which they solemnly signed and ratified. All that may have been said, declared, or resolved by the states as to the extent to which they intended to be bound, or as to the rights reserved, unless incorporated into the instrument which they signed and ratified, cannot now be considered in the legal construction of the constitution. That instrument must be interpreted in accordance with the terms and stipulations contained therein. If the states did not intend to be bound by the constitution as it is, then they ought not to have signed and ratified it; but having done so, they are legally bound by its terms and stipulations.

Another argument advanced in favor of separate state secession is, that the constitution was formed and ratified by sov-

oreign, independent states; that that being so, each state has the legal right to judge for herself when the compact has been broken, and to resume the exercise of her inherent sovereignty when, in her judgment, she thinks proper to do so; that between sovereign, independent states there is no common arbiter to judge. To the common understanding of mankind, it is extremely difficult to perceive why a sovereign, independent state should not be bound by her voluntary engagements in the same manner as individuals, and be required to perform them. Vattel, in speaking of the sovereignty of states (an authority with which the framers of the constitution were obviously familiar), declares that "several sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be each individually a perfect state. They will, together, constitute a federal republic; their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent when he is obliged to fulfill engagements which he has voluntarily contracted": Vattel, p. 3, c. 1, sec. 9. Concluding, then, that the several states were sovereign and independent at the time of the adoption of the federal constitution, they were able and willing to bind themselves together in a perpetual union, for the purpose of establishing a government, and voluntarily entered into a solemnly executed compact for that purpose, and the constitution is the legal evidence of that executed compact. Whatever powers, therefore, these sovereign, independent states voluntarily granted to the federal government which they organized and created,—whatever restraints they voluntarily imposed upon themselves as to the exercise of their respective attributes of sovereignty, as manifested by the constitution,—they are irrevocably bound thereby; for, in the language of Mr. Justice Story, in *Martin v. Hunter's Lessee*, 1 Wheat. 304, "the constitution was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence." An executed compact differs in nothing from a grant: 2 Bla. Com. 443. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right; a party is therefore always estopped by his own grant,

although that party be a sovereign state: *Fletcher v. Peck*, 6 Cranch, 308.

But if we concede, *ex gratia*, that one state has the legal right, by virtue of her inherent sovereignty, to judge for herself that the executed compact into which she voluntarily entered has been broken, and adopts her own mode and means of redress, still it must also be conceded that every other state in the Union has precisely the same right, by virtue of her inherent sovereignty, to judge for herself that the executed compact has not been broken, and the result would be a resort to force to decide that question, which would necessarily defeat the declared object and intention of the people of the respective states in the formation of the government of the United States. The framers of the constitution, however (with that consummate wisdom and practical statesmanship which so eminently qualified them for the work which they performed), have made ample provision in the constitution for the arbitration of all such controversies and disputes. The states themselves, by their own voluntarily executed compact, created the supreme court of the United States, and declared that it should be the peaceful arbiter to settle all controversies arising between the respective states; the states, by their solemn, executed compact, voluntarily renounced the right to judge for themselves, as between each other, and the decision of their own chosen arbitrator, upon a proper case being made, is binding upon them. The argument, therefore, that there is no common judge to settle and determine controversies between sovereign, independent states, and that they have the right to judge for themselves, has no legal foundation or support, when attempted to be made applicable to the states of the American Union, for the reason that they, by their own voluntary engagements, have expressly stipulated in the constitution that all controversies between them shall be determined by a tribunal of their own creation and selection, which excludes all pretension that they may lawfully do it for themselves.

This view of the question is in strict accordance with the general principles of the law by which civil society is governed. Vattel states the rule to be, "That if any disputes arise in a state respecting the fundamental laws, the public administration, or the rights of the different powers of which it is composed, it belongs to the nation alone to judge and determine them conformably to its political constitution":

Vattel, 12, sec. 36. Conformably to the political constitution of the United States, the supreme court is made the chosen arbiter, to judge and determine the disputes and controversies that may arise between the respective states of which the government of the United States is composed, and not each state in her individual capacity. This is no impeachment of the sovereignty of the states, but is in strict accordance with their own voluntary executed compact, as expressly declared in the constitution, in order to perfect and promote the practical operations of that government which they created and established for the benefit of themselves and their posterity. The ultimate political sovereignty of the government created by the federal constitution resides in the United States of America. That government was not formed by the people of the American Union, nor does it purport on the face of the constitution to have been so formed; but on the contrary, it purports to have been formed by "we, the people of the United States," and not by "we, the people of the American Union." The constitution was formed and the federal government created by the people of the respective states acting in their sovereign capacity as distinct and separate political organizations. When the constitution was adopted and ratified by the people of the respective states in their sovereign capacity as states, they did not empty themselves of any portion of their political sovereignty, or make any specific division of it. Sovereignty is indivisible and unalienable: Vattel, 27, 31, secs. 65, 69. They formed a government, however, by their solemn executed compact, adequate to the wants and necessities of the people of the respective states, provided all the necessary political and judicial machinery, so as to make it a practical working government to endure throughout all time. The several states by their voluntary executed compact expressly stipulated that the federal government which they created, its officers and agents, should exercise certain enumerated attributes of sovereignty in their joint names, and solemnly stipulated that they would not, either expressly or by necessary implication. The powers granted to the federal government by the states as expressed in the constitution were intended to be a consolidation of power in that government, to that extent, intended to vest in that government the supreme, irresistible, absolute, uncontrolled authority over the people of the respective states, so as to act efficiently and directly upon them as individuals, and as a unit in the execution of those granted powers. It

must be conceded, therefore, that the federal government, to the extent of the powers granted to it by the states in the constitution, is, in the language of Washington, a consolidated government, and that the primary object was a consolidation of the Union, at least to that extent: See Washington's letter transmitting the federal constitution to the Continental Congress. The powers not granted to the government of the United States by the constitution, nor prohibited by it to the states, are expressly reserved to the states, or to the people thereof; and a state, in the language of the supreme court in the case of *City of New York v. Miller*, 11 Pet. 139, "has the same undeniable and unlimited jurisdiction over all persons and things within its territorial jurisdiction as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States." Thus it is apparent that whatever powers were granted by the voluntary executed compact of the sovereign states to the federal government, to be exercised in their joint names for the preservation and consolidation of the Union as therein expressed, binding upon them to that extent, and no more. "In England, the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts, therefore, he engages in, no other person in the kingdom can legally resist or annul": 1 Bla. Com. 257. The sovereign power of the state of Georgia at the time of the adoption and ratification of the federal constitution was vested in the people of the state as a distinct and separate political organization. Whatever, therefore, they in their sovereign capacity voluntarily bound themselves to do or not to do, by the terms and stipulations contained in the constitution of the United States, they could not afterwards legally delay, resist, or annul by separate state secession from the Union; they were inviolably bound in law by their solemn executed compact; for we have already shown that their declared object was to form a more perfect union of the states, which union was then already declared to be perpetual.

We have previously stated that the ultimate political sovereignty of the federal government resides in the United States of America. The truth of this proposition may be illustrated by reference to the contemporaneous history of that government from the day of its organization up to the present time. "Sovereignty," says Vattel, "is that public authority which commands in civil society, and orders and directs what each citizen is to perform to obtain the end of its institution":

Vattel, p. 12, sec. 34. All the laws of the federal Congress are enacted in the name of the United States, where the political sovereignty resides. All orders of the federal government are issued in the name of the United States, where the political sovereignty of the government resides. Treason is an offense committed against the political sovereignty of the government. The federal constitution declares that treason "shall consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort." The process and mandates of the federal courts issue in the name of the United States, where the political sovereignty resides. The flag of the Union is an emblem of sovereignty, but it was not designed with one star as representing the sovereignty of the federal government, or as representing the sovereignty of the entire people of the American Union; but it was designed with thirteen stars, thereby intending to represent the sovereignty of the thirteen United States, and wherever that flag floats on the land or the sea, it is an emblem of the sovereignty of the United States of America, where the ultimate political sovereignty of the federal government resides. By article 6 of the constitution of the United States it is declared that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Why is the constitution and laws of the United States made in pursuance thereof the supreme law of the land? Because the several states of the Union, acting in their sovereign capacity by their voluntary executed compact, have declared that they shall be so, in order to form a more perfect union, etc. Why are the citizens of Georgia bound to observe and obey the constitution and laws of the United States made in pursuance thereof as the supreme law of the land? Because the state, acting in her sovereign capacity, has commanded them to do so in the constitution of the United States, in order to form a more perfect union, etc. The mandate of the states is not any the less potent or imperative because it is embodied in the constitution of the United States. All the powers granted by the states to the federal government in the constitution are to be exercised by that government, and are made obligatory upon the citizens of every state by the volun-

tary executed compact of the states acting in their sovereign capacity as such, in order, as they declared, to form a more perfect union than that which then existed by the Articles of Confederation, which was declared therein to be a perpetual union. It is an undeniable fact that the political sovereignty of each of the states at the time of the formation of the constitution resided in the people thereof, and that the federal government, from the time of its organization under the present constitution, has been operated and conducted in the name of that sovereign authority, to wit, "The United States of America." The several states when they assembled in convention to form the constitution had two leading objects in view: 1. To preserve the union of the states; 2. To form a federal constitution adequate to the exigencies of government. The result of their labors is to be found in the constitution of the United States. The several states by their voluntary executed compact created the federal government, and granted such powers to it as in their judgment would be adequate to the exigencies of good government. The constitution so formed was submitted to a convention of delegates chosen in each state by the people thereof, was ratified by them as separate and distinct political organizations, and thus became the supreme law of the land.

The state of Georgia, then, ever since the adoption and ratification of the federal constitution, has, and does now, constitute an integral part of the political sovereignty of the government of the United States of America. She became so by her own voluntary, executed, irrevocable compact, for the express purpose of forming a more perfect union of the states than that which already existed; to establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to her people and their posterity. By no act of her people, therefore, could she lawfully reassert and resume the powers thus granted, and thereby destroy the unity of that government of which she constituted an integral part, except by successful revolution, which has not been accomplished. It is to be regretted that the political heresy of peaceable state secession from the Union as being practically different from revolution should ever have found a lodgment in the minds of our people. It finds no legal support either in the federal constitution or in the decisions of the supreme court of the

United States, the recognized interpreter and expounder of that instrument.

The result and logical conclusion, therefore, is, that the plaintiff in error, when he made the contract sued on to serve as a substitute in a war against the government of the United States of America, of which government the state of Georgia constituted an integral part, violated the supreme, paramount law of the land, and the contract is therefore null and void. Allegiance is the tie or ligament which binds the citizen to the government in return for the protection which the government affords him. The paramount allegiance of the plaintiff as a citizen of Georgia was due to that government which she in her sovereign capacity had commanded him to obey as the supreme law of the land, and her mandate is to be found in the constitution of the United States, which declares that that constitution, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. The plaintiff contracted to engage in a war against the United States. The state of Georgia in her sovereign capacity has commanded him, as well as all of her citizens, in the constitution of the United States, to observe that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." These mandates, made to the citizens of the state by her sovereign authority, are not any the less binding upon them because the same are embodied in the constitution of the United States. It is the voice of their sovereign speaking as an integral part of the sovereignty of the government of the United States in the most authoritative and solemn form, and in the language of her own voluntary executed compact, which all are bound to obey as the supreme law of the land, for the simple reason that the state in her sovereign capacity, in common with the other states which formed and ratified the federal constitution, has commanded them to do so. It is therefore the judgment of the majority of the court that the judgment of the court below be affirmed.

HARRIS, J., dissented in this case, and also in that of the *Central Railroad and Banking Company v. Ward*, 37 Ga. 515; and in order to afford a correct understanding of this opinion, it becomes necessary to state that in the latter case Ward claimed certain shares of the Central railroad stock as purchaser from those who claimed it under proceedings of confiscation and judgment of

the "district court of the Confederate States of America, for the southern district of Georgia," condemning the stock as the property of alien enemies, and citizens of another of the United States. But on appeal the court held that the purchaser of the stock who derived title as mentioned above did not acquire the legal title so as to defeat the original holders of such stock, and that the railroad company could not be compelled to enter a certificate of ownership upon their books in favor of such purchasers.

In dissenting, the learned jurist based his opinion upon two propositions, and contended that either of them, if true, left the opinion of the majority of the court wholly unsupported. The propositions were: 1. "If the states which withdrew from the federal Union, and formed afterwards the Southern Confederacy, were sovereign or perfect states at that time, as such states they had a right to engage in public war with those states which continued in the federal Union"; or 2. "If the states attempting to withdraw from the federal Union formed the *de facto* government called the Southern Confederacy, and engaged in war with those which did not attempt to withdraw, and that war was recognized by the federal government as a civil war, and the Southern Confederacy as a belligerent power, then from such recognition the Southern Confederacy was invested with all the belligerent rights and powers which belong undeniably to sovereign states or nations engaged in public war; or in other words, the question is, whether the war between the states was a public or a civil war."

He then stated that under the view taken by him, it must be conceded by all reasoners that when the federal constitution of 1798 was adopted and ratified by the conventions of the separate states, they were each sovereign and independent, with the unquestionable right either to reject or to agree to it. If they were sovereign and independent at that time, and could not have been coerced by their associates, under the confederation articles, "to agree to the more perfect union of the federal constitution, the important inquiry arises, and demands a definite answer, When and by what instrument was their sovereign and separate existences as states lost or surrendered? That sovereign powers, which were withheld by the states from the confederate congress, which preceded the adoption of the federal constitution, were, by the latter instrument, delegated to the departments of government under it for the exercise of those powers for the benefit of the states thus united, is undeniable; but upon the authority of what publicist can such delegation to a common agent of such sovereign powers be held to be the surrender of sovereignty?" His honor then says that an answer to those who contend that the sovereignty of the states was surrendered by the adoption of the federal constitution is found in Vattel, and is as follows: "Finally, sovereign or independent states may unite themselves together by a perpetual confederacy without ceasing to be each individually a perfect state; they will together constitute a federal republic; their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it in virtue of their voluntary engagements. A person does not cease to be free and independent when he is obliged to fulfill engagements which he has voluntarily contracted."

This quotation, he says, is conclusive that, by adopting the federal constitution, the states did not cease to be free and independent because they covenanted with each other, and could therefore be compelled to fulfill their engagements thus voluntarily contracted. He considered it apparent that the obligation to fulfill covenants made by a sovereign state is compatible with continuing sovereignty and independence, and that the states suffering

by a breach of such covenants may, as in all cases of leagues, conventions, compacts, and treaties, redress themselves as independent and sovereign states can do; but that because such rights of redress have attached, they can in no wise affect the character of the states, breaking their covenants as states. He says: "Let it be borne constantly in mind that that character remains unaltered and unalterable by any violation of their covenants. There is no fact more indisputable than that if any prominent advocate of the federal constitution had, in any one of the state conventions, either directly or indirectly, intimated an opinion that by the ratification of the federal constitution the states surrendered their separate individuality and sovereignty as states, such was the extreme jealousy for the maintenance of state sovereignty, such an opinion or intimation of opinion would have led to the prompt and overwhelming rejection of the instrument." This contemporary history his honor thinks conclusive that the states were as sovereign after the ratification of the United States constitution as they were under the Articles of Confederation; and he continues: "The inquiry is, then, the states being perfect states according to Vattel, not whether they had a right to withdraw from the federal Union or constitutional compact without incurring the penalties they hazarded by so doing, but whether the power to withdraw is not a right necessarily inherent in every perfect state. If they were perfect states, they had an inherent right to alter their forms of government, and to institute new governments. Their obligation to observe the covenants of the federal constitution was exactly the same as that resting upon the sovereign states in their conventions, compacts, and treaties with each other, the engagements being between equals, conferring rights and imposing restrictions. The reasons for justification for a breach of their engagements should be so strong as to vindicate their acts before the world of public opinion. Whether broken with or without adequate cause, or however those engagements may have been sought to be enforced, the important fact stands out, unaffected by any of these considerations, that the acts done were acts of sovereign or perfect states." And he then asserts, as uncontrovertible, the following propositions: "1. That the federal constitution was made by the people of separate, sovereign, and independent states; 2. That ratifying the federal constitution by separate state conventions, they, by such action, distinctly asserted their sovereign and independent character as states; 3. That the federal constitution contains within itself no surrender of their individual character as states; 4. That being perfect states, the southern states, renouncing the obligations of the federal Union, had an inherent right to form, as they did, the Southern Confederacy; 5. That as perfect states, they had a right to engage in war, as other sovereign states could do." And in his mind it followed, that the war between the Confederate States and the loyal states was a public war; that being public, there was no doubt that its prosecution, in accordance with the rights and rules of war, was legal; that to states engaged in public war belong the rights of raising and maintaining armies, coining and borrowing money, employing public credit, issuing treasury notes, employing all instrumentalities for defense, weakening their adversary, by capture at sea and upon land, and by confiscation of the enemies' property within their limits. The judge then cites *Brown v. United States*, 8 Cranch, 143, to show that enemies' property found within belligerent territory is liable to confiscation; that war is not of itself an actual confiscation; that it confers, however, the right to confiscate, and that the enemy's title to his property remains unimpaired until hostile seizure and possession; and he considers the war between the states to have been a

public war; that the property of loyal citizens was liable to seizure and confiscation by the Southern Confederacy; that it was authorized by the law of war, and that after condemnation and sale the purchaser thereof acquired a valid title; and further, that the note in suit was founded upon a legal consideration.

His honor next said that as it was not necessary, in order to maintain his conclusions, to contend that the war was public, and as that might be denied, he proposed to consider the question involved as it was affected by civil war, in speaking of his associates, he said: "They are constrained, logically, I think, in order to maintain their judgments, to assume that the southern states, in attempting to throw off the obligations of the federal constitution, and forming new government, and waging war with the states which remained in the federal Union, were insurgents and rebels against the lawful sovereign authority of the United States government, and that consequently, whatever acts were done by them in the prosecution of such insurrection were illegal and void." He then proceeds to remark that an insurrection is an armed resistance to the laws of a state or the United States by some of its citizens; and he cites the cases in Massachusetts, in 1789, and in Pennsylvania, in 1793; but when the uprising covers a territory or state, and the citizens are in arms, not by their own will, but by compulsory power on the part of the state government, the resistance assumes such proportions that it is acknowledged by nations as civil war. He then refers to the *Price Cases*, 2 Black, 635-670, where the argument was made that the southern people were insurgents and traitors, and therefore could not make war; and he quotes Grier, J., as replying: "The law of nations is called the law of nature. It is founded in the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this court is, for the first time, desired to pronounce, to wit, that insurgents, who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies, because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a war, because it is an insurrection." Judge Harris again expresses the opinion that the war was a public war, and that his associates must acknowledge it as a civil war so long as the supreme court of the United States had so declared it; and that they must recognize it as drawing after it all the consequences which flow from such recognition. He then quotes Vattel as saying that "a civil war breaks the bands of society and government, or at least suspends their force and effect. It produces, in the nation, two independent parties, who consider each other as enemies and acknowledge no common judge."

"The two parties, therefore," says Harris, J., "must necessarily be considered, at least for a time, as constituting two separate bodies, or distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest, and have recourse to arms. This being the case, it is very evident that the common laws of war, those maxims of moderation and honor, ought to be observed by both parties in every civil war. A civil war is never proclaimed *eo nomine* against actual insurgents. Its actual existence is a fact which a court is bound to notice and to know. Its true test is to be found in the fact that the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open. A civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land." He quotes from

Wheaton's treatise on the law of nations as follows: "The general usage of nations regards such a war as entitling both of the contending parties to all the rights of war against each other, and even as respects neutral nations." He also quotes from Nelson, J., dissenting in the *Prize Cases*, *supra*, as saying: "In the case of a rebellion, or a resistance of a portion of the people of a country against an established government, there is no doubt if, in its progress and enlargement, the government thus sought to be overthrown sees fit to recognize or declare the existence of a civil war, that recognition or declaration will draw after it all the consequences and rights of war between the contending parties as in the case of public war." The dissenting judge claims that by the law of nations, when there is a civil war in existence which has been recognized by the government claiming supreme authority, such war is in all respects similar to, and stands upon the same footing as, a public war between sovereign nations, and that the result is that all the rights and consequences which belong to public war attend civil war, and the act of Congress of July 13, 1861, recognizing civil war between the federal Union and the Confederacy necessarily constituted a recognition of the Southern Confederacy as a belligerent power or government *de facto*. Such recognition must also be considered as a concession that the confederacy had the same rights and powers claimed and exercised by the federal government, for it drew after it the acknowledgment that it was a government invested with all departments, powers, and rights necessary to such a government, and essential to its existence.

He says: "Such belligerent power or *de facto* government, then, could rightfully do, in carrying on the civil war and maintaining its resistance, what a free and independent state could do, — the measures of right and power and means being precisely the same in both belligerents. It follows from this postulate that in the administration of justice in the decision of questions before its courts, indeed, in all matters touching its own defense or security, the acts of the several departments of a belligerent power or *de facto* government are as legal and unquestionable as are those of independent nations." He then goes on to show that it was insisted by counsel for the Central railroad, in the suit concerning the shares of stock, that the *Prize Cases*, *supra*, only decided "the existence of war, and of belligerent rights whilst the war continued"; and he remarks that if counsel meant to say that the United States supreme court held that the civil war amounted to an insurrection only, and that it did not change the relations of the states engaged so as to make them enemies to each other, they certainly misunderstand the extent of the principles of public law governing the cases decided; for the *Prize Cases*, *supra*, admit "that, in organizing the rebellion, the states acted as states claiming to be sovereign; that it was no loose organized insurrection, having no defined boundary or possession. It had a boundary marked by lines of bayonets, and south of this line is enemies' territory, claimed and held in possession by an organized, hostile, belligerent power." But when counsel say that belligerent rights belonged to the Southern Confederacy only while the war existed, "if thereby it was meant to assert or covertly insinuate that the conquering government could at its will or pleasure retract when the war was ended what it had granted during the war, and that it could treat, as illegal, acts which during the war were conceded to be legal, it is a proposition so monstrous from its unmitigated iniquity as to shock the reason and forbid its consideration. . . . Conquest gives no right to undo what during war was rightfully done. Whatever acts were done by a belligerent power in the exercise or enforcement of belligerent rights stand afterwards as they

stood when done,—legal, unimpeachable. Any other conclusion would make the concession of belligerent rights, if not sheer nonsense, a mere mockery, a fraudulent device to lull the fears of a belligerent adversary at the time, and to acquire substantial and unequal advantages thereby, and upon the cessation of hostilities, to reassert all the powers and claims which had been waived.”

The federal government cannot, after recognizing the war as a civil war, claim the southern states as being in insurrection, and her citizens as rebels and traitors. “Its jurisdiction over them has passed away by its consent and acts. They can be treated only as foreign enemies, over whom the municipal laws of the conquering government cannot be extended. That government cannot drag the citizens of the conquered *de facto* government, now before its municipal tribunals, to answer to charges of treason. If there was originally, in resorting to arms, insurrection and treason, that government has condoned it by recognizing it as civil war. All its power over those in arms ceased by raising them to its level, and terming them and treating them as enemies; and the epithets of rebels and traitors, applied to them so freely, through ignorance or malice, are as inappropriate and untrue as they are insulting and wanting in magnanimity. . . . The federal government has no right whatever to vacate the judgments of the prize and other courts of the confederate government in sequestering or confiscating enemies’ property within its limits, nor in any mode can it divest the title of a *bona fide* purchaser of such property actually confiscated, so as to restore it to the original owner unaffected by what has transpired. . . . Conquest gives no right to private property not seized and appropriated as booty at the time; and hence, the railroad shares in the hands of a *bona fide* purchaser,” after judicial condemnation and sale, not having been recaptured by the federal government, the doctrine of *jus postliminii* does not prevail; as they were confiscated as enemies’ property during the civil war, and sold without coming again into the possession of the federal government, they could not be restored to their original owner. It follows from this reasoning, the *Prize Cases*, *supra*, and international law, the railroad stock confiscated, condemned, and sold by the confederate government as enemies’ property, passed out of the possession of the Southern Confederacy, and the title of the *bona fide* purchasers under such sale is good as against the original owners; therefore the railroad and banking company should be compelled to make entries of the ownership of the stock on their books to the purchasers; and it also follows that the note in suit was founded on a valid consideration.

The learned judge continues, that the termination of the civil war dissolved the confederate government, but that the states of which it was composed remained perfect states during such war; that while the conquest restored the power of the federal government, and authorized it to alter or change any laws or institutions opposed to its own, such conquest did not, nor could it, give the federal government power over acts past and executed, so as to annul those which, when done, were legal, and the execution of which at the time was a right belonging to the belligerent power.

Judge Harris again deplors the fact that his associates regarded the Civil War as a mere insurrection, while in his own mind it acquired the character of a public war, which invested the belligerent power, or *de facto* government, with all the rights and powers of an independent nation to engage in and prosecute a war, as much so, in fact, as if the Southern Confederacy had been a foreign nation, and its citizens foreign enemies. In conclusion he says: “I am persuaded that if the principles of public law determining the

rights and relations of states in peace and war, and the results of conquest, were thoroughly understood and applied by the municipal courts of the United States government, and of the states which have been conquered, with intelligence and fidelity, the multitude of questions which now vex, and will for years probably agitate, our tribunals, and which at every step are embarrassing the interpretation and validity of contracts, could receive an easy and correct resolution. I file this dissentient opinion under the strong conviction that the time is not distant when the legal mind of this country will be found in entire unison with the views I have expressed; and then the wonder will be, that reason had ever been so demented as to deny or ignore their conclusiveness."

CONTRACTS MADE TO AID CONFEDERATE FORCES during the Civil War were void: *Wood v. Stone*, 88 Am. Dec. 601; *Bowman v. Goncal*, 92 Id. 537, and note; *Houston v. Deloach*, 43 Ala. 364; S. C., 94 Am. Dec. 689, and note.

RIGHT OF STATE TO SUCCEED: *Christholm v. Coleman*, 43 Ala. 204; S. C., 94 Am. Dec. 677; *Hall v. Hall*, 43 Ala. 488; S. C., 94 Am. Dec. 703, and notes to these cases.

TYUS AND BEALL v. RUST.

[37 GEORGIA, 574.]

BILL OF INTERPLEADER MAY BE FILED where two or more claim the same thing from complainant by different or separate interests, and he, not knowing to which of the claimants he ought of right to render the thing in dispute, fears that he may suffer injury from their conflicting claims, and therefore prays that they may be compelled to interplead, and state their claim, so that it may be adjudged to whom the claim belongs.

INTERPLEADER. — WHERE WAREHOUSEMAN, AS AGENT, sells the property of his bailor stored with him to a purchaser who leaves the property in the warehouse, he is not entitled to file a bill of interpleader to prevent suits brought against him by the original bailor, who denies the agency and the purchaser, both of whom claim title to the property.

PARTY CANNOT FILE BILL OF INTERPLEADER who is obliged to put his case upon the ground that, as to some of the defendants, he is a wrong-doer.

BILL OF INTERPLEADER MUST CONTAIN AFFIDAVIT of complainant that there is no collusion between him and any of the defendants.

THE opinion states the facts.

Strozier and Smith, and Wright and Warren, for the plaintiffs in error.

Davis and Lyon, for the defendant in error.

By Court, WARNER, C. J. This is a bill of interpleader filed by Rust, as the surviving copartner of Sims and Rust, who were warehousemen, against Tyus, who is his bailee of fifty-three bales of cotton, and Jeremiah Beall, to whom the complainant, as a warehouseman, sold the cotton as the agent or

factor of Tyus; and the question to be decided is, whether the complainant has made such a case, as exhibited by the record, as will entitle him to maintain his bill of interpleader. A bill of interpleader may be filed where two or more persons claim the same debt or duty, or other thing, from the complainant, by different or separate interests, and he, not knowing to which of the claimants he ought of right to render the same debt, duty, or other thing, fears that he may suffer injury from their conflicting claims, and therefore he prays that they may be compelled to interplead, and state their several claims, so that the court may adjudge to whom the same debt, duty, or other thing, belongs: Story's Eq. Pl. 237, sec. 391. In this case, Rust, the warehouseman, had either the general or special authority to sell the cotton for Tyus, his bailor, or he did not. If he had either the general or special authority, as the agent of his principal, to sell the cotton, then Beall, the purchaser, acquired a good title to the cotton, and is entitled to the possession of it. But if Rust, the warehouseman, did not have the authority to sell the cotton for Tyus, his principal, or violated his special instructions in relation to the sale of it, then he is liable to his principal for any violation of his duty as warehouseman and factor which he may have legally incurred. If the facts be true, as stated in his bill, he can successfully defend himself at law against Tyus's action of trover for the cotton; and there is no legal or equitable ground for withholding the possession of the cotton from Beall, the purchaser. Why should Beall be enjoined from prosecuting his action of trover for the cotton against Rust when the latter had the authority of Tyus, his principal, to make the sale of it to him? Why should Rust refuse to deliver the cotton to Beall if he made the sale in good faith, as the agent of his principal, and received the purchase-money therefor? After the sale of the cotton to Beall, Rust held the cotton as the agent and factor of Beall, and not as the agent and factor of Tyus. If Rust, the warehouseman, is not a wrong-doer as against either of the parties claiming this cotton, then he is in no danger from the suits instituted against him therefor. But if he is a wrong-doer as to either of the parties, defendants in this transaction, then he cannot maintain this bill of interpleader; for, as remarked by Lord Eldon, in *Stingsby v. Boulton*, 1 Ves. & B. 334, "a person cannot file a bill of interpleader who is obliged to put his case upon this: that as to some of the defendants he is a wrong-doer." There is another

objection to this bill, there being no affidavit of the complainant; that there is no collusion between him and any of the parties defendant, which is necessary when a bill of interpleader is filed: Story's Eq. Pl. 237, sec. 291. In view of the facts of this case, as exhibited by the record, we are of the opinion that the demurrer to the bill should have been sustained, and the bill dismissed. Let the judgment of the court below be reversed.

BILL OF INTERPLEADER, WHEN MAY BE FILED: *Gibson v. Goldthwaite*, 42 Am. Dec. 592; *Adams v. Dickson*, 65 Id. 608, and note 611.

BAILER CANNOT MAINTAIN INTERPLEADER against his bailor and a stranger claiming by adverse title: Note to *Shaw v. Coster*, 35 Am. Dec. 704; *Hatfield v. McWhorter*, 40 Ga. 273, both citing the principal case.

WRONG-DOER AS TO EITHER OF DEFENDANTS will not be allowed to file a bill of interpleader: Note to *Shaw v. Coster*, 35 Am. Dec. 702; *Hatfield v. McWhorter*, 40 Ga. 273, both citing the principal case.

BILL OF INTERPLEADER MUST CONTAIN AFFIDAVIT of complainant that there is no collusion between him and either of the defendants: *Gibson v. Goldthwaite*, 42 Am. Dec. 592; *Shaw v. Coster*, 35 Id. 690, and note 707, citing the principal case.

MYERS AND MARCUS v. KAUFFMAN. TAYLOR v. GREEN.

[87 GEORGIA, 600.]

SPECIFIC CONTRACT TO PAY IN "AMERICAN GOLD COIN," OR "IN GOLD," cannot be discharged by payment in legal-tender notes, unless such notes are at par value with gold; but a tender of such notes and the difference between them and the gold is sufficient to discharge the debt.

THE opinion states the facts.

Carswell and Ockington, Barnes and Cumming, and Stephens, for the plaintiffs in error.

Hook and Carr, and F. Chambers, for the defendant in error.

By Court, HARRIS, J. In the first of the above-stated cases the facts were, that plaintiffs rented a store in Augusta to Kauffman, who agreed to pay for it quarterly \$350 "in American gold coin." Kauffman sought to discharge his contract by an offer of \$350 in legal-tender notes, which was refused. It was admitted that the currency or legal-tender notes were of less value at the time of the offer to pay an equivalent amount in them than the gold stipulated for. The judge below erred in deciding as he did. A specific contract like this

to pay in American gold cannot be discharged by the payment in legal-tender notes of a nominally equal amount with the gold agreed to be paid, unless it should happen that the legal-tender notes were in the market at par value with the American gold.

Upon the plaintiffs, however, receiving from Kauffman the actual market difference in value between the American gold which he promised to pay, and the legal-tender notes which he offered to pay,—that difference in the value of the two things being virtually a portion of the damages plaintiffs were entitled to by reason of Kauffman's failure to comply with his contract,—Myers and Marcus will then be bound under the act of Congress to receive the legal-tender notes in discharge of the debt of Kauffman thus fixed by the ascertainment of plaintiffs' damages.

In the case of *Thompson v. Riggs*, 5 Wall. 578, the justice of the supreme court of the United States, delivering the opinion of the court, said: "A party agreeing to pay in bullion or coin must do so, or answer in damages for its value; and so if one agrees to pay in depreciated paper, the tender of that paper is a good tender, and in default of payment the promisee can recover its market, and not its nominal, value."

This extract from a case involving the interpretation of the legal-tender act of 1862 has furnished the rule for the decision of the case in the record. The judgment below is therefore reversed.

The case of *Taylor v. Green*, at the head of this opinion, from the Ocmulgee circuit, having been brought to this term, but coming up subsequently for decision to the case of *Myers and Marcus v. Kauffman*, from its facts, must be controlled by it,—in that case Taylor agreed to pay in gold.

The ruling of the judge below, being in accordance with our decision in *Marcus and Myers v. Kauffman*, we affirm his judgment.

EFFECT OF LEGAL-TENDER ACTS upon specific contracts to pay in gold coin: *Lane v. Gluckauf*, 87 Am. Dec. 121, and note 125-127; *Galliano v. Pierre & Co.*, 89 Id. 643; *Dutton v. Pailaret*, 91 Id. 135, and note 136.

McCALLIE AND JONES v. WALTON.

[37 GEORGIA, 611.]

EXISTING CORPORATION MAY MAKE ASSIGNMENT in trust for all its creditors. **ASSIGNMENT BY CORPORATION OF ALL ITS PROPERTY** in trust for the benefit of all its creditors, with direction that the assignees shall proceed with reasonable and convenient dispatch to convert the property into money, and for that purpose to sell and dispose of any and all of the property in such manner and on such terms as they may deem most for the interest of such trust, is valid, and not obnoxious to the statutes of 13 and 27 Elizabeth, as an attempt to delay creditors.

UNLESS INTENT AND PURPOSE TO HINDER AND DELAY CREDITORS is clearly visible in an assignment for the benefit of creditors having the appearance of fairness, it should not be held obnoxious to the statutes of 13 and 27 Elizabeth.

JUDGMENT OBTAINED SUBSEQUENT TO ASSIGNMENT for the benefit of creditors creates no lien so as to give it priority in the distribution of assets.

THE opinion states the facts.

Barnes and Cumming, for the plaintiffs in error.

Hull, for the defendants in error.

By Court, HARRIS, J. 1. By reference to the facts in this case, it appears that the Augusta Insurance and Banking Company, on the 29th of December, 1865, made in behalf of all its creditors an assignment to Robert Walton, Sen., and William A. Walton, in trust, etc. This corporation at that time existed, and has not been dissolved, either by judgment of forfeiture, or by a surrender of its franchises, accepted by the legislature. What reason, then, was there that it should not, like a natural person, make a fair assignment in trust for all its creditors? That it was permissible by the rules of a common law, seemed too clear to be at this day a matter of denial. In Georgia, no statute prevents an assignment by an existing corporation.

2. But it has been argued with great earnestness that the terms of the assignment brought it within the purview of the statutes of 13 and 27 Elizabeth, and that therefore the assignment was void. The assignment being of all its property, real and personal, in trust for all its creditors, with direction that the assignees should proceed with reasonable and convenient dispatch to convert the property into money, and for that purpose to sell and dispose of any or all of the property in such manner and on such terms as they may deem most for the interest of said trust, we do not perceive how the end to be accomplished, the conversion of the property into money

for distribution among the creditors of the company, could have been well and beneficially accomplished without such a fair and rational discretion as was conferred on the assignees. We see no attempt in that discretion to hinder and delay creditors, but on the contrary, a careful precaution to prevent a sacrifice of the property, whereby the creditors would have been injured. Without such intent or purpose being made clearly visible, an assignment having the appearance of fairness should not by the courts be held obnoxious to those statutes.

3. The record shows that the judgment of plaintiffs in error, who are contesting the validity of the assignment, was obtained subsequent to the assignment. At the execution of the assignment, the claim of plaintiffs was upon a policy of insurance issued by the company for loss sustained by fire; their damages had not, at that time, by proof, been ascertained and fixed; the claim, therefore, had that grade only which contracts of a similar description had; no lien recognized by law had given it a priority. This was the *status* of the claim at the making of the assignment; the subsequent lien created by judgment could not be made to relate back, and class it with the judgments existing when the assignment was made. The result is, that the assignees can regard in the payment of the creditors of the assignor only the rank or priority of the debts at the time of the assignment.

Judgment affirmed.

CORPORATION MAY MAKE ASSIGNMENT for the benefit of its creditors: *Sargent v. Webster*, 46 Am. Dec. 743, and note 747; *Graham v. Crossland*, 56 Ga. 280; *Harvey v. Cubbage*, 75 Id. 795, both citing the principal case.

ASSIGNMENT GIVING ASSIGNEE POWER TO SELL on such terms as he may deem advisable, or within his discretion, validity of: *Hutchinson v. Lord*, 60 Am. Dec. 381, and note 389; *Keep v. Sanderson*, 60 Id. 404, and note 406, 407; *Nye v. Van Huse*, 74 Id. 690, and note 698.

FRAUDULENT INTENT WILL NOT BE INFERRED in an assignment for the benefit of creditors when an honest intent can be inferred from its language: *Nye v. Van Huse*, 74 Am. Dec. 690, and note 698.

JUDGMENT SUBSEQUENT TO ASSIGNMENT does not create a prior lien: *Churchill v. Morse*, 92 Am. Dec. 422.

DOBBINS v. WALTON.

[37 GEORGIA, 614.]

ASSIGNMENT FOR BENEFIT OF CREDITORS. — Provisions of Georgia code relating to the "forfeiture of bank charters and liabilities to stockholders," and giving to bill-holders priorities over other creditors, also prescribing the order of payment of debts when the bank is insolvent, and prescribing the duties of a receiver appointed by the court after rendition of judgment forfeiting the charter, has no application to a voluntary assignment by a bank for the payment of all its debts.

WHERE BANK MAKES ASSIGNMENT FOR BENEFIT OF CREDITORS, and among its assets are certain shares of stock in another corporation, the latter corporation by assenting to the assignment does not lose its lien given by law for the payment of the value of such stock.

ASSIGNEE OF VOLUNTARY ASSIGNMENT FOR BENEFIT OF CREDITORS stands in no better situation than the assignor. Neither he nor the creditors whom he represents are purchasers for valuable consideration, without notice, as against prior equitable liens.

IN PROCEEDINGS TO DISTRIBUTE FUNDS UNDER ASSIGNMENT for the benefit of creditors, any creditor who has a claim against the fund, but who is not a nominal party to the suit, may make himself a party thereto in fact by coming in and presenting his claim under the decree and submitting himself to the jurisdiction of the court.

THE opinion contains the facts.

William Dougherty, for the plaintiff in error.

W. H. Hull, and Barnes and Cumming, and Hook and Carr, for the defendants in error.

By Court, WALKER, J. The Augusta Insurance and Banking Company, being unable to pay its debts, assigned all of its property, real and personal, to trustees, who were authorized to dispose of the same "by dividing the entire net fund among the creditors of said company, of every sort and description, with no other preference than is or may be authorized by law." In directing the order in which the trustees should pay out the funds, the court decided that the holders of the bills of the bank, by the laws of Georgia, have no preference over other creditors' liquidated demands.

This ruling was excepted to, and the learned counsel for plaintiff in error relies upon section 1493, paragraph 3, Revised Code, sections 1495 and 1494. Sections 1493 and 1495 are placed under article 3, entitled, "Forfeiture of Bank Charters and Liability to Stockholders." After specifying the grounds for which a forfeiture may be declared, and providing for the appointment of a receiver, the code, in section 1493, prescribes the duties of the receiver as follows: 1. To convert the prop-

erty into money; 2. To pay the creditors *pro rata*, semi-annually; 3. "To pay the holders of the bills before other creditors, if they give notice of their claims within six months"; 4. To give notice to said bill-holders and other creditors, by a three months' publication; 5. To make annual returns of receipts and disbursements; 6. To distribute the assets, after paying all the debts, among the stockholders. This entire section is prescribing the duties of a receiver appointed by the court after the rendition of a judgment forfeiting the charter, and does not apply to a voluntary assignment for the payment of all the debts of the bank. Section 1494 provides for the receiver's compensation. Then comes section 1495, chiefly relied upon by counsel for plaintiff in error. This section provides that "if the bank is insolvent, the order of paying off the debts shall be the same as is prescribed in cases of administration, to the extent applicable, except where special preference or postponement is given by law." "If the bank is insolvent,"—what bank is here referred to? Most clearly such as the preceding sections had been speaking of, namely, a bank whose charter had been forfeited and its assets placed in the hands of the officer of the court. This construction is strengthened by referring to the three sections immediately following this one; they are all in relation to matters connected with such a bank. Not one word is said about an "assignment by banks," until section 1499 is reached, and this provides, upon the surrender of the charter, for an assignment "as natural persons may, but it cannot thereby prevent such preference among its creditors as the law gives. Taking all the sections together, we think that the provisions of 1495, and part 3 of 1493, apply to banks alone whose charters may have been forfeited and their assets placed in the hands of receivers. Such banks may very properly be recognized as deceased, and their assets paid out in the order prescribed in cases of administration. But this case is different. Here is no forfeiture and no surrender of the charter. This is a voluntary assignment by the bank of all its assets, to be divided "among the creditors of said company, of every sort and description, with no other preference than is or may be authorized by law." The assignment gives no preference to any of the creditors. We have shown that the preference claimed by plaintiff in error as conferred by law is inapplicable to the facts of this case. It was not insisted that there was any other provision of the law giving any preference, and we know of none such. The rights

of the respective creditors must be decided by the terms of the deed of assignment, and that is for the creditors of said company of every sort and description. The only error we see in this case was in excluding the open accounts from a participation in the general fund; but this ruling is not excepted to, and it was in favor of the party complaining here. As we hold that all the creditors of the company were entitled to share in the distribution, it is unnecessary to determine whether the claims of McCallie and Jones and others were liquidated demands or not.

2. Another question made in this record is, whether "the Georgia Railroad and Banking Company, by assenting to the assignment, lost its lien on the forty-four shares of stock owned by the Augusta Insurance and Banking Company." It could not be denied that the Georgia Railroad Bank by law was entitled to a lien on this stock for the debts due by the owner of it, the Augusta Insurance and Banking Company: Prin. Dig. 358; Pamph. Acts 1840, p. 25; Acts 1843, p. 20. This is admitted, but it is insisted that the Georgia Railroad Bank assented to the transfer of the stock to the assignees, and thereby lost its lien; and authorities are cited showing that when a party voluntarily parts with the possession of the property upon which the lien has attached, he is divested of his lien. We have no fault to find with this as a general proposition; the question is as to its application to the facts of this case. Here was a general assignment for the benefit of all the creditors, "with no other preference than is or may be authorized by law." To this the Georgia Railroad Bank assented. One of the preferences authorized by law was a lien on the stock for the amount due by the assignor. The error into which the counsel fell was in considering this assignment as a sale to a *bona fide* purchaser without notice. The assignee of a voluntary assignment for the benefit of creditors stands in no better a situation than the assignor. Neither he nor the creditors whom he represents are purchasers for a valuable consideration, without notice, as against prior equitable liens: *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Knowles v. Lord*, 4 Whart. 500 [34 Am. Dec. 525]; 2 Kent's Com. 532, note c.

There was no parting with the possession of this stock in the eye of the law. All the Georgia Railroad Bank did was to assent to the transfer from the name of the bank to that of its assignees for the payment of its debts; the deed of

assignment recognizing such preferences as were allowed by law. Most clearly this was no such sale as would defeat the lien of the Georgia Railroad Bank, and the court did right so to hold.

There was no error in permitting other creditors to come in and be made parties to the proceedings to distribute the funds in court. In the case of *Macon and Western R. R. Co. v. Parker*, 9 Ga. 378, this court holds that "any creditor who has a claim upon the fund, but who is not a nominal party to the suit, may make himself a party thereto in fact, by coming in and presenting his claim under the decree, and submitting himself to the jurisdiction of the court for its settlement and adjustment upon the fund to be distributed." This point was not seriously urged, though it was made in the bill of exceptions. Upon the whole case, we see no error in the court below.

Judgment affirmed.

PROVISIONS OF CODE REGULATING COLLECTION AND DISTRIBUTION of the assets of a bank by a receiver, appointed upon a judgment forfeiting its charter, does not apply in the case of a voluntary assignment by a bank of its assets to pay its debts according to the requirements of law: *Fouche v. Brower*, 74 Ga. 267, citing the principal case.

ASSIGNEE UNDER VOLUNTARY DEED OF ASSIGNMENT for the benefit of creditors stands, as to suits, in no better situation than the assignor: *Fouche v. Brower*, 74 Ga. 269.

WILKOWSKI v. HALLE.

[37 GEORGIA, 673.]

APPLICATIONS FOR CONTINUANCES are addressed to the sound legal discretion of the court, and if not expressly provided for, will be granted or refused as the ends of justice may require.

NOTARY PUBLIC, WHO IS ATTORNEY AT LAW, is not authorized to take the affidavit and bond of his client and issue the attachment in a case where he is employed.

THE opinion states the facts.

Lyon and De Graffenreid, for the plaintiffs in error.

W. Poe, for the defendants in error.

By Court, WALKER, J. 1. All applications for continuances are addressed to the sound legal discretion of the court; and if not expressly provided for, shall be granted or refused as the ends of justice may require: Code, sec. 3480. In this

case, there was no such abuse of the discretion of the court below as to require this court to control the exercise of that discretion.

2. Was the process of attachment founded upon an affidavit taken by a notary public employed in the cause, and issued by him, void? By the old law, a notary public was not empowered to issue an attachment. This power was conferred on him by the act of March 4, 1856: Pamp. Acts, p. 25; and this act was embodied in the code: Sec. 3200. Section 2201 provides that the party seeking the attachment, before the same issues, shall give bond, with good security, conditioned to pay the defendant all damages that he may sustain, and all costs that may be incurred by him, in the event that plaintiff shall fail to recover in said case; "which bond it shall be the duty of the magistrate, or other officer before whom the affidavit is made, to take."

Shall the attorney of the plaintiff take this bond, which the law provides for the defendant's security against a wrongful issuing of the attachment? Shall the plaintiff's attorney be the judge as to the sufficiency of the bond to protect the opposite party, and as to the solvency of the surety? Is not this, at least, a *quasi* judicial proceeding? The officer taking the affidavit is in duty bound to take the bond, to decide upon its sufficiency, its legality, and its solvency. Does not this duty come within the prohibitions of section 193, Revised Code?—which says: "No judge or justice of any court, no ordinary, justice of the peace, nor presiding officer of any inferior judicature, or commissioner, can sit in any cause or proceeding in which he is pecuniarily interested, or related to either party within the fourth degree of consanguinity or affinity, nor in which he has been counsel, without the consent of all the parties in interest." Is not the taking of the affidavit of the plaintiff, and bond to indemnify the defendant against damages and costs, "a proceeding" in which the attorney for the plaintiff, in this case, "sits"? He decides upon these things.

Again, by section 443, Revised Code, attorneys have certain powers therein specified, "but they cannot take affidavits required of their clients, unless specially permitted by law." Now, the technical meaning of the phrase, "take affidavits," refers to the certifying or qualifying parties to affidavits. Upon first reading the clause quoted, I was inclined to think the words were not used in their strict technical sense, but

intended to say that attorneys could make affidavits for their clients only in those cases specially permitted by law. Upon reflection, I am rather inclined to think, with my brethren, that the words are used with strict legal accuracy, and intended to reach just such a case as this; more especially when taken in connection with the general rules of the law upon the subject. Mr. Tidd says: "By the general practice of all the courts, affidavits sworn before the attorney or solicitor in the cause cannot be read. And this practice extends to affidavits taken before attorneys, as commissioners, in causes wherein they are concerned for the parties on whose behalf such affidavits are made": 1 Tidd's Pr. 494. In the case of *King v. Wallace*, 3 Term Rep. 403, it is held that the court of king's bench will, in no case, issue an attachment against a party at the suit of another, where the affidavits on which the motion is founded are sworn before the agent of the prosecutor. In the case of *Hopkinson v. Buckley*, 8 Taunt. 74, "Vaughan, sergeant, showed cause against a rule which had been obtained by Hullock, sergeant, and insisted that it must be discharged with costs, as all the affidavits of the party which were the foundation of the rule had been sworn before his own attorney in the cause. The court observed that it was extremely wrong for the attorneys in a cause to act as commissioners in taking the affidavits of their clients, and gave judgment that the rule be discharged with costs." So in the case of *Jenkins v. Mason*, 3 Moore, 325, in the same court, it was held that an affidavit stating that the defendant had been discharged under an insolvent debtor's act cannot be sworn before his own attorney in the cause. The rule is the same in chancery. In 3 Daniell's Chancery Practice, 234, it is said that "it is to be observed, also, that the master extraordinary, before whom the affidavit is sworn, must not be a solicitor in the cause." "In the matter of Thomas Hogan, a lunatic, August 9, 1754, the petitioner had taken all the affidavits before himself, notwithstanding he had been solicitor throughout in the cause." Lord Chancellor Hardwicke: "If I had known this at the time, I would not have suffered the affidavits to be read. At common law it is always objected to and discountenanced, and equally so in equity, from the inconvenience that would arise if such a practice was suffered; for this and other reasons, the petition was dismissed, with costs to come out of the pocket of the solicitor who thus very improperly took the affidavits." The same rule obtains in New York. "Skinner was about to read

an affidavit in support of a motion in this cause, when Wolworth objected that the affidavit had been taken before the attorney for the plaintiff, who was commissioner for taking affidavits, to be read in this court. *Per curiam*: The practice of the court of king's bench is not to allow an affidavit taken before the attorney in the cause to be read. It is a very fit and proper rule, which we shall therefore adopt as the practice here": *Taylor v. Hatch*, 12 Johns. 340. In *Bac. Abr.*, Bouv. ed., 147, it is said: "Affidavits taken before a person who is a solicitor in the cause are not allowed to be read either at law or in equity; nor can affidavits be received which are sworn before the attorney of the party or his partner."

These authorities seem very clear and directly in point. Read in the light thus reflected, we think the code excludes a notary public from taking the affidavit of his client, and issuing the attachment in a case where he is employed as an attorney at law.

This court has applied the same principle to the taking of depositions. In *Tillinghast v. Walton*, 5 Ga. 335, it is decided that if the relation of the commissioner to either party in the cause is such as to warrant the inference that he may act under a bias to either party, he is not competent to act as commissioner, and excluded testimony taken by the clerk of one of the counsel in the cause. In delivering the opinion, page 340, Judge Nisbet says: "The policy which excludes a solicitor of a party is founded in a just apprehension that from his relationship to him he will not deal fairly by the adverse party. This policy ought also to exclude his clerk. Nay, further: it has been held that if the clerk of a solicitor in the cause has been employed as clerk to the commissioner, the depositions shall be suppressed"; citing *Newton v. Foote*, 2 Dick. 793; S. C., 2 Ch. 393; *Cook v. Wilson*, 4 Madd. 380. This case was approved in *Glanton v. Griggs*, 5 Ga. 429 et seq.; and on page 433 it is said the commissioners, like jurors, should be free from all impressions and influences. For the time being they discharge judicial functions. They should not be under the power nor owe suit or service to either party. The same principle will exclude a notary public from taking the affidavit and bond and issuing an attachment in a case where he is employed. Other reasons connected with public policy might be given, but we forbear. We think, both upon principle and authority, that the attorney, who may be a notary public, is not authorized to take the affidavit and

bond of his client and issue the attachment in a case where he is employed; and that the court erred in not sustaining the objection made to the attachment on this account.

Judgment reversed.

POWER OF NOTARY PUBLIC TO TAKE AFFIDAVITS OR ACT WHERE HE IS ATTORNEY OR INTERESTED PARTY. — As is shown by the principal case, it seems to be the settled practice in England that affidavits taken before attorneys or solicitors interested in the case cannot be read. But while there is some contrariety of opinion in the American cases, still the majority of the latter establishes the rule that such practice does not prevail in this country, for as was said in *Dave v. Glasgow*, 1 Burn. 8: "Although there is an obvious impropriety in an attorney in a cause taking, as a judicial officer, the affidavit of his client, which is to be the foundation of the action, yet, as there is no provision of law or rule of court to prohibit his doing so, this court cannot say that, from the fact of his being attorney, he is not a proper officer before whom the client may make the necessary affidavit, and that the proceedings should be therefore dismissed." In *Kuhland v. Sedgwick*, 17 Cal. 123, it was held that an attorney, who was also a notary public, might take the affidavit of his client verifying the complaint; and in *Reavis v. Cowell*, 56 Id. 588-591, affirming *Kuhland v. Sedgwick*, *supra*, the court say, in referring to section 2093, Code of Civil Procedure, authorizing notaries public to administer oaths and affirmations: "There is no such limitation found in the act to the power of a notary as is contended for in this case, and there is nothing in the rules of the court, to which our attention has been directed, prohibiting the notary from administering an oath to or taking the affidavit of his client. . . . We are of opinion that an attorney who is a notary may take the affidavit of his client. It is now, and has been for many years, the practice in this state; and however improper or reprehensible the practice may be, there is nothing in the law which prohibits it." In *Young v. Young*, 18 Minn. 90, it was decided that a notary, who was an attorney of record in the cause, was authorized under the statute to take an affidavit of the service of a summons.

In New York, however, a different rule prevails, and an affidavit will not be allowed to be read in support of a motion, if taken before an attorney of record in the cause: *Taylor v. Hatch*, 12 Johns. 340. And in New Jersey, in the case of *Den v. Geiger*, 4 N. J. L. 225, the court say that an affidavit taken before one of the counsel in the case cannot be received in evidence. But if the affidavit is taken by counsel who is not the attorney of record in the cause, it may be read: *Willard v. Judd*, 15 Johns. 531. So an affidavit for a *certiorari* may be taken before the attorney who commenced the action, for he may not be retained in the prosecution of the suit: *Vary v. Godfrey*, 6 Cow. 687. And an affidavit may be read which was taken before an attorney who did not appear of record, but who was a partner of the attorney for one of the parties to the suit: *Hallenback v. Whitaker*, 17 Johns. 2.

INTEREST DISQUALIFIES. — It seems that where the notary is a party in interest he is disqualified to take the acknowledgment to any writing: Profatt on Notaries, sec. 35; *Groenbeck v. Seeley*, 13 Mich. 330-345. Thus, one who identifies himself with a transaction evidenced by a written instrument, by placing his name on the face thereof as agent for one of the parties thereto, is incompetent, as a notary public, to take acknowledgment of any of the parties: *Sample v. Irwin*, 45 Tex. 567. But relationship to the

grantees will not disqualify a notary from taking the acknowledgment to the deed: *Lynch v. Livingston*, 6 N. Y. 442; S. C., note to *Withers v. Baird*, 32 Am. Dec. 757. The protest of a note by a notary public, who is a stockholder in the bank which is a party to the suit, is not competent evidence to charge an indorser: *Bank v. Porter*, 2 Watts, 141; and see note to *Withers v. Baird*, 32 Am. Dec. 758, where a lengthy quotation is made from the former case. But where the notary was the employee of a bank in which one of the firm desiring an attachment was also an employee and stockholder, it was held that this did not create such a relation between them as made it improper for the notary to issue the attachment, nor did it render the writ so issued void: *Georgia Ice Co. v. Porter and Meakin*, 70 Ga. 637.

MOTION FOR CONTINUANCE is within the discretion of the court, and its decision will not be interfered with unless injury or injustice to the parties have plainly resulted from it: *Ayres v. Duprey*, 86 Am. Dec. 657, and note 663; *McDaniel v. State*, 47 Id. 93; *State v. Hildreth*, 51 Id. 364.

MIMS v. WEST.

[35 GEORGIA, 13.]

JUDGMENT SHOULD NOT BE ENTERED AGAINST GARNISHEE, unless it appear affirmatively that at the time of the garnishment the defendant had a cause of action against the garnishee for the recovery of a legal debt, due or to become due, and such judgment would be available to the garnishee as a defense against any action afterwards brought against him on the debt in respect of which he is charged.

DEBT NOT DUE IS SUBJECT TO GARNISHMENT.

MAKER OF PROMISSORY NOTE CANNOT BE CHARGED AS GARNISHEE OF PAYEE under process served before the maturity of the note, unless it be affirmatively shown that prior to the rendition of the judgment the note had become due, and was then still the property of the payee.

BONA FIDE PURCHASER OF PROMISSORY NOTE FROM PAYEE, FOR VALUE AND BEFORE MATURITY, IS NOT AFFECTED BY GARNISHMENT PROCESS served upon the maker of the note in an action against the payee, although the payee was the owner of the note at the time of the service of the process.

DOCTRINE OF LIS PENDENS DOES NOT APPLY TO NEGOTIABLE PAPER.

BILL in equity. The defendant in error, Philip West, brought an action against the plaintiff in error, Wade H. Mims, and sued out process of garnishment, which was served upon a number of persons, including one Jackson, as debtors of Mims. Jackson had made a promissory note payable to Mims. After the service of the garnishment process upon Jackson, and before the maturity of the note, Mims transferred the note for a valuable consideration to one Bird, who had no notice of the garnishment. Transfers of other notes were similarly made to various persons by Mims. West thereupon brought this bill, claiming that the transfers were as to him illegal and

void, and asked for an injunction to restrain further transfers and changes. Bird answered the bill and moved to dissolve the injunction. The motion was refused, and this is assigned as error.

Hawkins, Kimbrough, and Ansley, for the plaintiffs in error.

F. H. West, for the defendant in error.

By Court, WALKER, J. 1. When a person is served with a summons of garnishment, he is required to answer what he was indebted to the defendant at the time of the service of said garnishment: Rev. Code, sec. 3226; and if unable to admit or deny his indebtedness, he should plainly and distinctly set forth the facts, so as to enable the court to give judgment thereon: *Id.*, sec. 3492. Judgment should not be entered up against the garnishee, unless it appear affirmatively that at the time of the garnishment the defendant had a cause of action against him for the recovery of a legal debt, due or to become due by efflux of time; and no judgment should be entered against the garnishee unless it would be available as a defense against any action afterwards brought against him on the debt in respect of which he is charged: *Drake on Attorneys*, secs. 461, 583. The garnishee cannot be compelled to pay the debt twice: *Brannon v. Noble*, 8 Ga. 550.

Under the old law, it would seem that a debt not due was not subject to garnishment. In *Dalton v. Solly*, Cro. Eliz. 184, "it was held *per curiam* that a foreign attachment cannot be of a debt before it be due; and therefore, whereas one was indebted in a sum of money to be paid at Michaelmas, and it was attached before Michaelmas, but the judgment of the attachment was not till after Michaelmas, it was clearly held to be void, because it was not due when attached." This was decided in 1590. This rule seems to have been changed in Georgia: See *Glanton v. Griggs*, 5 Ga. 424; *King v. Carhart*, 18 Id. 650; and probably in most of the states of this Union: See *Sayward v. Drew*, 6 Me. 263; *Willard v. Sheafe*, 4 Mass. 235; *Fulweiler v. Hughes*, 17 Pa. St. 440; *Steuart v. West*, 1 Har. & J. 536; *Peace v. Jones*, 3 Murph. 256; *Branch Bank v. Poe*, 1 Ala. 396; *Dunnegan v. Byers*, 17 Ark. 492. Mr. Drake, in his work on attachments, section 587, states correctly the principles which now govern in relation to negotiable securities not due. He says: "As a general rule, the maker of a negotiable note should not be charged as garnishee of the

payee under an attachment served before the maturity of the note, unless it be affirmatively shown that before the rendition of the judgment the note had become due, and was then still the property of the payee." Again, in section 585, he says: "But though the garnishee should answer that the defendant at the time of the garnishment was the owner of the garnishee's note not then due, no judgment should be rendered against him, because his obligation is not to pay to any particular person but to the holder at maturity, whosoever it may be. Can the garnishee, or the defendant, or the court, say that the defendant will be the holder of the note at maturity? Certainly not; and yet to give judgment against the garnishee necessarily assumes that he will be." No judgment should be rendered against the garnishee unless it will, when satisfied, protect him against a subsequent suit to recover the same debt. Under the Revised Code, section 2732, the paper which Bird purchased from Mims on Jackson was a negotiable promissory note. He purchased for value before the note fell due, and without notice of the garnishment. What are his rights under this state of facts? The code, section 2743, says: "The *bona fide* holder for value of a negotiable instrument, who receives the same before it is due, and without notice of any defect or defense, shall be protected from any defense set up by the maker, except *non est factum*, gambling, or immoral or illegal consideration, or fraud in its procurement." And in section 2597 it is said: "The *bona fide* purchaser of a negotiable paper not dishonored, or of money or bank bills, or other recognized currency, will be protected in his title, though the seller had none." Here, it will be seen that negotiable paper not dishonored is placed on the same footing as money currency. The defenses which may be set up against such a paper are specifically named; and in none of them are the rights of the garnishee embraced, provided he should have to pay to the creditor.

In this case, suppose Jackson were adjudged liable to pay West the amount of this note, under the summons of garnishment, and the bill making Bird a party had not been filed, — when Bird shall sue Jackson on the note, can he set up as a defense that the money had been forced out of him by a creditor of Mims, and thereby defeat a recovery by Bird? If so, the effect would be to repeal section 2743; for that section, says Bird, shall be protected against such a defense as this. The *bona fide* purchaser of a negotiable instrument not due

stands in a great measure independent of the former holder. The law disconnects him with the previous title, and takes him into its own charge, as deriving a right from itself: See Cowen and Hill's Notes to 1 Phill. Ev., vol. 1 of Notes, p. 668, note 431.

The doctrine which we now lay down has been indirectly asserted by this court. In *Glanton v. Griggs*, 5 Ga. 436, this court says: "It being thus made to appear that Glanton had express notice of the attachment lien, he cannot disconnect himself from the previous title of Whatley. . . . But for this proof, having traded for the note before due, he would have been independent of the former holder, who transferred to him the note. . . . As it is, he took the note *cum onere*; nor is his claim paramount to that of the attaching creditor."

It was insisted that the case of *King v. Carhart*, 18 Ga. 650, is an authority in favor of the garnishing creditor in this case. That case decides that "debts secured by negotiable instruments may be the subject of garnishment." We have no complaint to make with this principle; it is right. The point here made is as between the rights of the garnishing creditor and the *bona fide* purchaser, before due, of a negotiable paper. No such question was made in that case; and even if it had been, the code has been adopted since that time (1855), and according to its provisions, the rights of the purchaser are paramount to those of the garnishing creditor. See also *Murray v. Sylburn*, 2 Johns. Ch. 444.

2. It was insisted that the doctrine of *lis pendens* should affect the purchaser, and operate as constructive notice to all the world that the creditor was proceeding to enforce his rights against the effects of his debtor, and that the service of the summons of garnishment on the maker of the note impounded the funds in his hands, so that a transfer of the note could not defeat the claim of the creditor. There is some force in this suggestion; but we think, looking to the policy of our legislature in favor of negotiable paper, that the better rule will be to hold that the rights of the purchaser are superior to those of the garnishing creditor. We have not been able to find many decided cases touching this question. We find one very well considered case, — *Winston v. Westfeldt*, 22 Ala. 760 [58 Am. Dec. 278]. In that case, an injunction was granted restraining the negotiation of a promissory note. The defendant, in violation of the injunction, transferred the note, for value, before due, to a *bona fide* purchaser, and the ques-

tion was, whether the purchaser or the complainant in the bill had the better title to the money due on the note. The case was ably argued, and well considered by the court; and the principle enunciated in the case is, that "the doctrine of *lis pendens* does not apply to negotiable paper. An injunction in force against the negotiation of a note does not destroy the negotiability, nor defeat the title of a *bona fide* purchaser, acquired pending the injunction, but without notice." This, certainly, is a stronger case than the service of a summons of garnishment.

Perhaps it may be well to repeat that we fully recognize the doctrine that negotiable instruments may be the subject of garnishment; but before judgment should be entered against the garnishee, it should affirmatively appear that the instrument is due, and belonged to the defendant subsequent to the time of the service of the summons, and to the time it fell due. These facts appearing, judgment may be safely entered against the garnishee, for a satisfaction of the judgment rendered upon this state of facts will be a protection to the garnishee against a second payment of the debt. The court should not permit a judgment to go unless such facts appear as will make the satisfaction of the judgment a protection to the garnishee.

In this case, Bird, having purchased the Jackson note before it fell due, and paid a valuable consideration for it, without any notice of the garnishment, got a good title to it, and one which is not, in any manner, affected by the process of garnishment. As to him, the court should have dissolved the injunction, the equity of the bill having been fully sworn off. The rights of the other parties can be passed upon when the facts are made manifest by the answers and proof.

Judgment reversed.

GARNISHEE IS NOT LIABLE, unless it appears that he had property, credits, or effects in his possession belonging to the defendant in garnishment, or was indebted to him: *Carson v. Allen*, 54 Am. Dec. 140; *Roby v. Labman*, 56 Id. 237; *Smith v. Davis*, 60 Id. 390.

GARNISHEE SHOULD NOT BE PLACED IN SITUATION where he will be compelled to pay the debt twice: *Walters v. Washington Ins. Co.*, 63 Am. Dec. 451; and see *Molynaux v. Seymour*, 76 Id. 662.

MAKER OF PROMISSORY NOTE, WHEN CHARGEABLE AS GARNISHEE: *Hubbard v. Williams*, 55 Am. Dec. 66, and note discusses the question; *Carson v. Allen*, 54 Id. 148, and note; *Ladd v. Baker*, 57 Id. 357; *Smoot v. Helava*, 58 Id. 310; *Emerson v. Patridge*, 62 Id. 617; *Davis v. Pawlette*, 62 Id. 690; *Bassett v. Garthwaite*, 73 Id. 257. The principal case is approved in *Burton v. Wynne*, 55 Ga. 617, on the point that a garnishee is not protected, if he pays to the

purchaser of an overdue note, but is protected if he pays to the purchaser of a note not due, after he is served with the summons.

DOCTRINE OF *LIS PENDENS* DOES NOT APPLY TO NEGOTIABLE PAPER: Note to *Newman v. Chapman*, 14 Am. Dec. 778; *Winston v. Westfeldt*, 58 Id. 278; *Diamond v. Lawrence Co.*, 78 Id. 429, 432.

BANK OF COMMERCE v. BARRETT.

[38 GEORGIA, 126.]

RECITAL OF CONSIDERATION IN PROMISSORY NOTE IS NOT NOTICE OF FAILURE OF CONSIDERATION, nor sufficient to put one upon inquiry, so as to defeat the claim of *bona fide* purchaser of the note before maturity.

ASSUMPSIT by the Bank of Commerce against the makers and indorser of the following note:—

“\$500.

AUGUSTA, GA., Aug. 5, 1866.

“One hundred and twenty days after date, we promise to pay to the order of Thomas G. Barrett, five hundred dollars, in consolidation of National Express and Transportation Company, value received, with interest after thirty days.

“BARRETT, CARTER, & Co.,

“J. V. H. ALLEN, Treasurer.”

Indorsed: “T. G. BARRETT.”

The Bank of Commerce had taken the note for value before maturity. The defense was, that the consideration of the note had failed, and that the bank took with notice thereof. The defendants offered evidence to show that the note was given in payment of a subscription to the stock of the National Express and Transportation Company, upon an agreement that the company should consolidate and reduce their stock, and that this agreement had never been carried out, and the failure to do so was a fraud upon the stockholders. This evidence was objected to by the plaintiff as immaterial until it was shown that the plaintiff was not a *bona fide* purchaser of the note before maturity, for value, and without notice, but the objection was overruled. The court charged the jury, among other things, that the words on the face of the note were notice to the party purchasing it of the consideration, and sufficient to put him upon inquiry as to whether or not the consideration had failed. The verdict was for the defendants. A motion for a new trial was overruled, and the plaintiff assigned error.

Barnes and Cummings, for the plaintiff in error.

W. T. Gould, for the defendants in error.

By Court, McCAY, J. This was a suit upon a promissory note. The note expressed upon its face to be "to pay to the order of Thomas G. Barrett five hundred dollars, in consolidation of National Express and Transportation Company, value received." On the trial, the court charged the jury that the words on the face of the note were notice to the party buying it of the consideration, and sufficient to put him upon inquiry as to whether or not the consideration had failed.

The *bona fide* purchaser of a note not due, who has no notice of a failure of consideration, cannot be defeated by such a plea. Notice of the consideration alone is nothing. Why should that affect him? That the note was given for money, or a horse, or a house, is wholly immaterial. How can the knowledge that a note was given for a horse be notice that the horse has proven worthless? One can perhaps imagine a case in which the mere knowledge of the consideration would involve also the knowledge of its failure,—as when the failure was matter of universal notoriety, or was caused by the party charged, etc., but so far as appears, this is not such a cause.

Nor is the other point in the charge, that the knowledge of the consideration is sufficient to put the party upon inquiry, good law. Such a rule would largely restrict the negotiability of commercial paper, and has, so far as we know, no authority to support it.

Judgment reversed.

TRANSFEREE OF NEGOTIABLE PAPER WHETHER BONA FIDE HOLDER IF HE HAS NOTICE OF SUSPICIOUS CIRCUMSTANCES, which, upon inquiry, might have led him to a knowledge of prior equities or defenses: See *Bay v. Codrington*, 9 Am. Dec. 268, and note; note to *Sims v. Lyles*, 28 Id. 156; *Vairin v. Hobson*, 28 Id. 125; *Pierce v. Ricker*, 31 Id. 728; *Stalker v. McDonald*, 40 Id. 339; *Russell v. Haddock*, 44 Id. 693, and note; *Snyder v. Riley*, 47 Id. 452; *Mages v. Badger*, 90 Id. 691, and notes.

WALLACE v. CANNON.

[38 GEORGIA, 199.]

ONE WHO IS INJURED THROUGH NEGLIGENCE OF ANOTHER WHILE BOTH ARE VOLUNTARILY ENGAGED IN SAME UNLAWFUL TRANSACTION will not be afforded any relief by the law.

ONE OFFENDER AGAINST LAW CANNOT SET UP AS DEFENSE THAT PLAINTIFF WAS ALSO OFFENDER, unless the parties were engaged in the same illegal transaction. It is only in such a case that the maxim, *In pari delicto potior est conditio defendentis et possidentis*, applies.

AM. DEC. VOL. XCV—25

ACTION by Mary E. Cannon, widow of Sylvester Cannon, against Campbell Wallace, superintendent of the Western and Atlantic railroad, to recover damages for the negligent killing of the plaintiff's husband. The facts are fully stated in the opinion.

P. L. Mynatt and L. E. Bleckey, for the plaintiff in error.

Robert Baugh and S. B. Hoyt, for the defendant in error.

By Court, WARNER, J. This was an action brought by the widow of Sylvester Cannon, an employee of the Western and Atlantic railroad, against that road, to recover damages for killing her husband by the negligence of another employee of the road, under the provisions of the code. On the trial of the case in the court below, it was insisted that the plaintiff was not entitled to recover, because her husband at the time he was killed was voluntarily engaged in the unlawful act of transporting confederate soldiers and munitions of war for the purpose of making war against the government of the United States. If the husband of the plaintiff at the time he was killed, and the other employees of the company at the time of the injury, were voluntarily engaged in transporting confederate soldiers and munitions of war upon the road for the purpose of making war upon the government of the United States, such voluntary engagement on their part was an illegal act, in violation of the constitution of the United States, the supreme law of the land. The court below charged the jury in relation to this point in the case: "If you shall believe from the evidence in this case that the deceased was voluntarily engaged in the performance of acts in violation of the constitution of the United States when he was killed, and from that cause solely, or from the fault or negligence of the said Sylvester at the time he lost his life, then the plaintiff is not entitled to recover. If the killing resulted solely from the fault or negligence of the defendant, or of an employee of the defendant, then the plaintiff is entitled to recover." This charge of the court is excepted to, and assigned for error here.

The charge of the court, so far as the same relates to the illegal employment of Cannon and the other employees of the road at the time of the injury, in view of the evidence in the record, was error. The question involved in that branch of the case was, whether the parties were voluntarily engaged

at the time of the injury in an unlawful transaction in violation of the constitution and laws of the United States; that was a distinct ground of defense against the plaintiff's right to recover. The injury was caused by the collision of the two trains running upon the road. The evidence is, that Cannon's train was freighted with confederate soldiers, two or three cannon, besides horses and harness, etc. Murphy testifies "that in 1862 the road was in the habit of carrying confederate soldiers; there were so many soldiers, and so much freight of the confederate government, that a great deal of confusion was produced." Wing, the conductor on the down train, testifies "that he had been carrying a load of confederate soldiers to Chattanooga, and was returning with an empty train; that he was ordered out by Colonel Camden, the agent of the road at Chattanooga." In view of the evidence contained in the record as to the illegal employment of the parties at the time the alleged injury occurred, the court, in our judgment, should have charged the jury that if they believed from the evidence that at the time Cannon was killed by the collision of the railroad trains, the railroad company and the employees of that company (including Cannon as well as the other employees whose negligence caused the injury) were voluntarily engaged in the transportation of confederate soldiers on the road for the purpose of making war upon the government of the United States, then the plaintiff is not entitled to recover.

There was much said on the argument of the case about the down freight train running on Sunday, in violation of the statute of this state. We do not recognize the doctrine that one offender against the law can set off against the plaintiff that he too is a public offender in another distinct transaction: See *Mohney v. Cook*, 26 Pa. St. 342 [67 Am. Dec. 419]; *Philadelphia, Washington, and Baltimore R. R. Co. v. Philadelphia Steam Towboat Co.*, 23 How. 209. To bring the parties within the rule of the law applicable to such cases, they must both have been engaged in the same illegal transaction; it is such cases only that the maxim of the law, *In pari delicto potior est conditio defendentis et possidentis*, applies. In all such cases the rule of the law is, to leave the parties where it finds them, giving no relief, and no countenance to claims of that character; not for the benefit of the defendant, but upon grounds of public policy.

Let the judgment of the court below be reversed.

ONE OFFENDER AGAINST LAW CANNOT SET UP AS DEFENSE THAT PLAINTIFF WAS ALSO OFFENDER: *Mohney v. Cook*, 67 Am. Dec. 419; but see the principal case followed, on a similar state of facts, in *Martin v. Wallace*, 40 Ga. 54.

BAILEY v. STROHECKER.

[38 GEORGIA, 259.]

MANDAMUS WILL LIE TO COMPEL PROPER OFFICER OF CORPORATION TO MAKE NECESSARY TRANSFER OF STOCK on its books to one who had purchased the same at sheriff's sale.

MANDAMUS. The plaintiff, Samuel F. Bailey, had sued out an attachment against one Jerry Cowles, and levied upon fifty shares of stock of the Empire State Iron and Coal Mining Company, serving a copy of the writ on the defendant, E. L. Strohecker, as president. Bailey afterwards recovered judgment against Cowles, under which the stock was ordered sold. Bailey bid in the stock, and the officer certified to that effect, but Strohecker refused to transfer the stock to Bailey. Bailey thereupon prayed for a *mandamus*. The court sustained a demurrer to the petition, on the ground that *mandamus* was not the proper remedy. The plaintiff assigned error.

S. T. Bailey, for the plaintiff in error.

Henry W. Cowles, for the defendant in error.

By Court, BROWN, C. J. We are satisfied the court erred in ruling that *mandamus* was not the proper remedy in this case. Section 3222 of the Revised Code points out the mode of levying an attachment upon the stock of a corporation owned by the defendant in attachment.

Section 3223 declares void all transfers of his stock, made by the defendant, after the attachment has been levied, and provides for the sale of the stock by the sheriff.

Section 3224 declares that "certificates of purchase shall be granted by the officer selling, as prescribed in case of executions, and on presentation of such certificates to the proper officer of said corporation, it shall be his duty to make such transfer on the books, if necessary, and afford the purchaser such evidence of title to the stock purchased as is usual and necessary with other stockholders."

The usual course is, for the sheriff who sells the property, which is not held adversely to the defendant in *feri facias*, to put the purchaser in possession. In case of the sale of stock in

a corporate company, the sheriff cannot do this, as the property is not tangible, and he has no such control over the books of the company as enables him to make the necessary transfer of the stock, which he has sold to the purchaser. In view of this difficulty, the legislature has substituted the proper officer of the corporation for the sheriff, and has made him, *pro hac vice*, a public officer, charged with the performance of this very duty, which he is required to perform upon the presentation of the certificate given by the sheriff to the purchaser at the sale. If he refuses to do this duty he may be compelled by *mandamus*.

Judgment reversed.

MANDAMUS, WHETHER LIES TO COMPEL TRANSFER OF STOCK IN PRIVATE CORPORATIONS: See note to *Dane v. Derby*, 89 Am. Dec. 736, which is at variance with the principal case. The principal case is cited in *Southwestern R. R. v. Thomasson*, 40 Ga. 411, to the point that in case of a *bona fide* sale of stock of a corporation, the law will compel the company to permit the transfer.

CAMPBELL v. MILLER.

[88 GEORGIA, 304.]

TRUSTEE IN POSSESSION OF TRUST PROPERTY IS ONLY BOUND TO ORDINARY DILIGENCE in its preservation and protection.

TRUSTEE MAY RECEIVE PAYMENT OF PROMISSORY NOTES HELD IN TRUST, WHEN DUE, IN SUCH CURRENCY as a prudent man would receive for debts due him individually under similar circumstances.

TRUSTEE WHO, IN GOOD FAITH, RECEIVED CONFEDERATE TREASURY NOTES IN PAYMENT OF PROMISSORY NOTES HELD IN TRUST, under the Georgia act of 1863, acted under color of law, and is protected by the act of 1866, and the ordinances of the conventions of 1865 and 1868.

TRUSTEE MIGHT, IN GOOD FAITH, PRIOR TO ADOPTION OF GEORGIA CODE IN 1863, RECEIVE PAYMENT OF PROMISSORY NOTES HELD IN TRUST in such currency as was generally received by prudent men in the transaction of their own business, and reinvest the same in the note of a person who was then entirely solvent.

TRUSTEE WHO RECEIVED CONFEDERATE CURRENCY IN PAYMENT OF PROMISSORY NOTES HELD IN TRUST, before the adoption of the Georgia code in 1863, and after its adoption invested it in securities not authorized by law, and without an order of court, did so at his own risk, and is liable for the value of the currency at the time when it should have been reinvested.

TRUSTEE WHO CHANGES INVESTMENT OF TRUST FUNDS WITH CONSENT OF CREATOR OF TRUST, who is of legal age, is not liable for any loss growing out of such new investment.

TRUSTEE MAY SHOW THAT INVESTMENT OR CHANGE OF INVESTMENT made by him was prudent.

COURT SHOULD CHARGE JURY IN WRITING when requested to do so, and without any verbal additions or explanations.

WRITTEN REQUEST TO CHARGE JURY MUST BE APPLICABLE TO FACTS AND TO LAW, or the court need not notice it; and the court may give the charge with verbal modifications, but the whole taken together must be correct.

BILL in equity by Cynthia Miller and her children against Samuel C. Campbell, alleging mismanagement and conversion by the defendant of a trust fund for the benefit of the complainants, and praying that the defendant pay the interest due thereon, that he be liable for the *corpus* of the fund, and that he be removed, and a new trustee appointed. In September, 1860, Jacob Miller and Cynthia Waugh, being about to intermarry, executed an instrument by which two promissory notes, of one thousand dollars each, belonging to Cynthia Waugh, were transferred to the defendant, in trust, to pay the interest on the sum to her during life, and at her death, to divide the sum among her children named in the instrument. In the fall of 1862, the defendant received payment of one of the notes in confederate currency, and invested the same in six boxes of tobacco, with the consent, as he claimed, of Mrs. Miller. The tobacco was placed in storage. In 1864, two of the boxes were lost or stolen, and the storer paid therefor to the defendant one thousand dollars in confederate currency. The currency was then much depreciated in value, and at the time of this suit was worthless. The defendant still had three of the boxes, one box having been given by him to Mrs. Miller. In 1862, also, the defendant took the note of a third person for the second of the notes held in trust, and in 1865 this note was exchanged for one which the defendant had himself given to the maker. The defendant offered to prove that his investment of the trust fund was, under the circumstances, a prudent investment, but the court said that the matter should be left to the jury. Counsel for the defendant requested the court to give his charge to the jury in writing; and requested, in writing, certain instructions to be given. The charge was written out, but in reading it, the court gave some verbal explanations. The jury found for the complainants. The defendant moved for a new trial, which was overruled, and error thereupon assigned. The questions involved appear in the opinion.

Doyal and Nunnally, and J. J. Floyd, for the plaintiff in error.

Peebles and Stewart, for the defendants in error.

By Court, BROWN, C. J. After a careful review of this case, I am satisfied that the "written synopsis of the points decided," which was reduced to writing and delivered during the term, with the concurrence of the whole court, covers every point that is material. I might sustain these points in a lengthy opinion, supported by numerous authorities, but I do not deem it necessary. Taken in connection with the report of the case, the following synopsis is all that is necessary to a correct understanding of the decision. I therefore annex it, as the written opinion of the court in this case, instead of using it as a *syllabus*, to be elaborated in the written opinion, as in other cases.

1. The marriage settlement in this case was a contract between the parties intending marriage and the trustee, which vested a life estate in the two thousand dollars of notes in Mrs. Miller, with remainder in her children, who are named after her death. A trustee in possession of the trust property is only bound to ordinary diligence in its preservation and protection.

2. If the trust property consists of promissory notes, the trustee may receive payment of the notes when due, in such currency as a prudent man would receive for debts due him under similar circumstances.

3. A trustee who, in good faith, received confederate treasury notes in payment of a note held in trust, under the act of the 18th of April, 1863, acted under color of law, and is protected by the act of 1866, and the ordinances of the conventions of 1865 and 1868, and if he invested said treasury notes without proper authority, or lost them by negligence, he will only be liable for their value when received, allowing him a reasonable time to reinvest. A trustee who held a promissory note in trust prior to the adoption of the code (1st of January, 1863), if he acted in good faith, had a right to receive payment in the currency generally received by prudent men in the transaction of their own business; and to reinvest such currency in the note of a person who was then entirely solvent; and if by the results of the war the maker proved insolvent, the trustee is not liable for the loss.

4. A trustee, who received payment of a note held in trust in the then currency, before the adoption of the code, and after its adoption invested it otherwise than in the stocks, bonds, or other securities issued by this state, or other securities authorized by law, and without an order of court, did so

at his own risk, and is liable for the value of the currency received by him, to be estimated at the time when it should have been reinvested, allowing him a reasonable time after its receipt to obtain the order and to reinvest the fund.

5. If the trustee changes the investment with the consent of the *cestui que trust*, who is of legal age, he is not liable for any loss growing out of such new investment.

6. The court erred in refusing to allow the trustee to prove that any investment made by him, or any change of the investment prior to the 1st of January, 1863, was a prudent investment.

7. Counsel having asked the court to give his charge to the jury in writing, it was his duty to do so, and he should have read it to the jury as written, without any additions or verbal explanations.

8. If counsel, in writing, requested the court to give certain charges to the jury, such written request must be upon a point applicable to the facts in the case, and must not assume that to have been proven which is not in proof, and must, as written out by the counsel, be correct law, or the court is not bound to notice it. If, however, the court thinks proper to give the point in charge with modifications, he may do so, and such modifications need not be in writing, but the whole taken together, as given by the court, must be correct.

Judgment reversed.

AMOUNT OF CARE REQUIRED IN GENERAL OF TRUSTEES IN PRESERVATION AND PROTECTION OF TRUST PROPERTY: See note to *Seawell v. Greenway*, 75 Am. Dec. 799; also *Knowlton v. Bradley*, 43 Id. 609; *Hutchinson v. Lord*, 60 Id. 381; *Kimball v. Reding*, 64 Id. 333.

TRUSTEE'S OBLIGATIONS AND LIABILITIES WITH RESPECT TO INVESTMENTS: See note to *Nyce's Estate*, 40 Am. Dec. 506; *Commissioners etc. v. Walker*, 38 Id. 433; *Knowlton v. Bradley*, 43 Id. 609; *Morris v. Wallace*, 45 Id. 642; *Kimball v. Reding*, 64 Id. 333.

TRUSTEES RECEIVING PAYMENT OF OBLIGATIONS IN CONFEDERATE CURRENCY. — An executor, administrator, guardian, or other trustee who received confederate currency in good faith during the war, when such currency was taken by prudent business men on their own account, will not be held liable for the loss thereby through the results of the war: *Jepson v. Patrick*, 39 Ga. 573; *Hathorn v. Maynard*, 54 Id. 688, both citing the principal case; and see note to *Nyce's Estate*, 40 Am. Dec. 509; *Watson v. Stone*, 91 Id. 484.

THE PRINCIPAL CASE IS CITED in *Wheatley v. West*, 61 Ga. 401, to the point that when a judge is requested to deliver his charge in writing, he has no discretion, but must write out his charge, and read it to the jury, and must not give any other or additional charge.

CLAYTON v. AKIN.

[28 GEORGIA, 320.]

PECUNIARY LEGACY GIVEN TO EXECUTOR IS GENERAL LEGACY, AND SUBJECT TO ABATEMENT with other general legacies upon a deficiency of assets, although it is expressed to be "in addition to the usual commissions at law, and as a full compensation for any extra trouble he may have in executing my will."

WORD "LEGACY" IN SUBSEQUENT ITEM OF WILL COVERS ALL OF SEVERAL REQUESTS IN FORMER ITEM, where a testator in a single item gives his wife a sum of money, various articles of personal property, and a life estate in certain realty, with the privilege of taking a sum of money in lieu of the life estate, and in a subsequent item declares that the "legacy" given to his wife was in lieu of dower.

GENERAL LEGACY GIVEN TO WIFE IN LIEU OF DOWER DOES NOT ABATE upon a deficiency of assets. The wife is a purchaser in such a case.

LEGACY MAY BE ADEEMED OR DESTROYED, IN GEORGIA, BY DELIVERY OVER OF PROPERTY TO LEGATEE by the testator during his lifetime, and if so, it does not pass under the will, and cannot be abated upon a deficiency of assets.

ADEMPMENT OR DESTRUCTION OF LEGACY BY DELIVERY OVER OF PROPERTY TO LEGATEE by the testator during his lifetime is a question of fact to be decided by the jury under the evidence.

DELIVERY OVER OF PROPERTY TO LEGATEE BY TESTATOR DURING HIS LIFETIME, IN ORDER TO AMOUNT TO ADEMPMENT or destruction of the legacy, must be of such a character as to show that it was with the intent of the testator to then part irrevocably with his dominion and ownership of the property.

BILL in equity for direction, filed by Warren Akin, executor of the will of John Clayton, Sen. In September, 1862, John Clayton, Sen., made his will, containing a number of items. Item third gave to the testator's wife, Agnes Clayton, fifteen hundred dollars in money, various articles of personal property, and a life estate in certain realty, with the privilege of taking one thousand dollars in lieu of the life estate. Item fourth gave Charles C. Clayton a plantation on Alatoona Creek, in Cobb County, and certain personal property. Item fifth gave two slaves to Letty Crow. Item sixth directed certain land, part of which was subject to the wife's life estate, and certain personal property to be sold, the proceeds of the land to be equally divided between John Clayton, Jr., and James K. P. Clayton, and the proceeds of the personalty to be distributed among certain nephews and nieces. Item seventh provided that "the legacy herein given to said wife is intended to be in lieu of any dower in and to any real estate or land I may own at the time of my death." Item eighth gave everything which the testator might acquire, and which was not disposed of by

his will to the nephews and nieces mentioned in item sixth. Item ninth appointed Warren Akin sole executor, and provided that, "in addition to the usual commissions at law, I give and bequeath to him one thousand dollars as a full compensation for any extra trouble he may have in executing this my will." Clayton died November 6, 1864. When the will was made he owned much personal property, which was afterwards lost or destroyed during the war. Mrs. Clayton elected to relinquish her rights to the life estate, and to take all the legacies, and to relinquish her right of dower. James K. P. Clayton died August 11, 1864, without issue, and Charles C. Clayton was appointed his administrator. The personal effects and assets of the estate were insufficient to pay the sums given to Mrs. Clayton and to Akin, and the expenses of administration, and it was necessary to resort to the lands mentioned in items fourth and sixth. Charles C. Clayton claimed that the land given in item fourth belonged to him; and evidence was introduced to the effect that in 1863 the testator told him he had given him the land, and that he accordingly bought out a tenant and went into possession of the land. The jury were instructed how to find their verdict. They found that the one thousand dollars given to Akin was a part of the expenses of administration; that the one thousand dollars given to Agnes Clayton in lieu of dower should be paid before any other debt or legacy; that the fifteen hundred dollars given to her was a general legacy, and should not be paid until all the specific legacies were satisfied; that the legacy to James K. P. Clayton was specific, and had lapsed by his death without issue before the testator died; that after paying the widow, the next payment should be the expenses of administration, including the one thousand dollars to Akin, and then the other debts due from the estate should be paid; that to make these payments the residuum of the estate, including the lapsed legacy should be first used, then the general legacies, then the legacies to John Clayton, Jr., and Charles C. Clayton, *pro rata*; and that Charles C. Clayton had no title to the plantation in the fourth item, except that derived from the will. Errors were assigned by Agnes Clayton and Charles C. Clayton.

W. T. Wofford and L. E. Bleckley, for Charles C. Clayton.

W. Akin and D. A. Walker, for Warren Akin and Agnes Clayton.

By Court, McCAY, J. 1. The legacy of one thousand dollars to the executor is, in every aspect of it, a general legacy; and as to abatement, in case of a deficiency of assets, must take its fate as such. It has been argued that the terms of the bequest are such that the legatee, in this case, is not a volunteer, but stands upon the footing of a purchaser. The authorities are abundant against this position: 2 Williams on Executors, 1171; *Fretwell v. Stacy*, 4 Ves. 434; *Attorney-General v. Robins*, 2 P. Wms. 23; *Herron v. Herron*, 2 Atk. 171. In all these cases the legacy was for "the care and pains" of the executor,—language which is, in effect, the same as is used by Mr. Clayton. It will be observed that this is not a question whether the legacy is a good one, or whether it is dependent on the executor acting, but whether it is a legacy which may be called upon to abate, with other general legacies, on a deficiency of assets. The distinction adopted in the cases is, that to constitute a legatee a purchaser, he must have had a subsisting right at the death of the testator. He must have given up something due, some right actually in existence as a legal claim, at the time the will took effect. The widows' dower, and a debt due from the testator to the legatee, are examples. Here is no debt. At the death, there was even no claim. It was at the option of the executor to act or not. Had this been a contract, binding upon both parties, made during the life of the testator, it might come within the rules; but, obviously, both the testator and the executor were unbound. The former might, at his pleasure, have made a new will, and the latter have refused to qualify. Nor is there any harm done. The executor acts with his eyes open. He has time to examine into the *status* of the estate before he qualifies, and he may easily know whether he will get the legacy in full. As a legacy, therefore, this must be considered a general legacy, liable, if necessary, to abate as such. The court, in this case, seems to have considered this one thousand dollars as part of the expenses of administration. It is either a legacy or nothing. If the executor in this case gets a thousand dollars, is it not that much more than the law will allow? It is, then, a bounty of the testator,—a legacy,—and the only question is, Is he a purchaser or not? Suppose he fails to qualify, has he any claims against the estate? Has he given up anything to take this? The expenses of administration are fixed by law. Such as the law allows he is entitled to. Here is a fixed sum of one thousand dollars, given

as a legacy. We are not able to see the force of the argument which gives this the dignity of expenses. It is a legacy, and nothing more, nothing less, given for good reasons and with good purposes, and standing upon the footing of other legacies, given for considerations and motives not amounting to a legal obligation, as past kindnesses, affection, moral obligations, etc.

2. The testator gives to Mrs. Clayton fifteen hundred dollars in money, and various articles of personal property, and a life estate in certain realty, with the privilege of taking one thousand dollars in lieu of the life estate,—all this in one item of the will. In a distinct item, he declares that the legacy to his wife is in lieu of dower. It seems to us conclusive that by the word "legacy" he meant all that he had given her in the former item. The life estate in the house and lot is not, perhaps, technically, a legacy, but the liberty to choose, in lieu of it, one thousand dollars clears up even that difficulty. We are of opinion, therefore, that the entire bequest in item third constitutes the legacy which was given her in lieu of dower. She has, first, her option to take her dower or resort to item third of the will. When she has done this, she may, at her pleasure, take the life estate in the house and lot, or one thousand dollars as part of her legacy.

3. Nothing is better settled than that the wife is a purchaser of a legacy, which she chooses, under a will, in lieu of her dower.

At the death of the testator, she has a legal right to her dower. It overtops all legacies, specific as well as general. It is a right superior even to the claims of creditors; and when she accepts the offer of exchange tendered her in the will, and gives up her dower, she pays a valuable consideration for the portion which she accepts: 1 Roper on Legacies, 432; *Burridge v. Bradyl*, 1 P. Wms. 126; *Blower v. Morret*, 2 Ves. Sr. 420; *Davenhill v. Fletcher*, Amb. 244; *Norcott v. Gordon*, 14 Sim. 258; *Isenhardt v. Brown*, 1 Edw. Ch. 441; *Locock v. Clarkson*, 2 Desaus. Eq. 476; *Heath v. Dendy*, 1 Russ. 543; *Williamson v. Williamson*, 6 Paige, 298. The cases in Amb. 244, 2 Ves. Sr. 420, and 1 Russ. 543, even go so far as to hold that this exemption from abatement, in case of a legacy, though general, in lieu of dower, in case of a deficiency of assets to pay debts and specific legacies, exists, though the legacy be of greater value than the dower. How far this may be true as against creditors, there seems to be no decision. Perhaps in such a case the amount of the excess might be of

moment. That this exemption from abatement is good even as to creditors does not appear to have been expressly settled. When it is a *bona fide* option, the principle would seem to go even to this extent. If it is a purchase, the creditors are not injured, since, in lieu of the legacy, the widow has thrown into the fund out of which they are to be satisfied her dower. The point, however, is not distinctly made in this case, and we do not settle it.

4. It is very plain that if, at the death of the testator, he was not the owner of the farm on Alatoona Creek, in Cobb County, given in the fourth item of the will to Charles C. Clayton, that legacy was adeemed. If he had sold it to some third person, or given it away in any binding manner, it would not have passed under the will. The legacy would have been adeemed; "destroyed" is, perhaps, the most appropriate word. It would not have existed as the property of the testator, and could not, therefore, pass by his will.

Our statute is as follows: "A legacy is adeemed or destroyed, wholly or in part, whenever the testator, after making his will, during his life, delivers over the property or pays the money bequeathed to the legatee, either expressly or by implication, in lieu of the legacy, or when the testator conveys to another the specific property, and does not afterwards become possessed of it, or otherwise places it out of the power of the executor to deliver over the legacy": Code, sec. 2427. Evidently, the point of this section is, that if the property, at the death, does not belong to the testator, then the legacy is destroyed. Now, it can make no difference who is the owner, if it has ceased to be the property of the testator. If he has delivered it over to the legatee in such a manner as to divest himself of the power to dispose of it before his death, then the legacy as such is destroyed. It does not pass under the will, for the simple reason that it has passed before the death. It is not, therefore, a legacy at all, and cannot be abated. It stands upon the footing of a gift during life.

5. But whether this be so or not is a question of fact to be decided by a jury under the evidence. If the testator, after making his will, "delivered over" this tract of land to Charles Clayton, with intent (to be made apparent by the facts as they occurred) to part with his own right and dominion over it at that time, then it ceased to be his; he gave it away during his life, and by that act he destroyed the legacy, and it did not pass under his will, but by his act during life. We express

no opinion as to what the facts do establish. That is for a jury to determine, under the charge of the court, as to the law as we have declared it. By the peculiar language of our code, section 2427, it is provided that "the delivery over of the property to the legatee, during the lifetime of the testator, is an ademption or destruction of the legacy." As a matter of course, this "delivery" must be with intent, by the testator, to part, then, irrevocably with his own dominion and ownership of the property, and to pass it into the legatee. We think the court ought to have left the facts of this transaction to a jury, charging them as to the law. If, during his life, the testator had delivered over this Alatoona Creek place, in Cobb County, to Charles C. Clayton, with intent then and there to pass the right and dominion of it irrevocably out of himself to Charles C., then it passed to him as a gift, and not as a legacy under this will.

Judgment reversed.

GENERAL LEGACY TO WIDOW IN LIEU OF DOWER DOES NOT ABATE WITH OTHER LEGACIES: 3 Pomeroy's Eq. Jur., sec. 1142; compare *Perrine v. Perrine*, 10 Am. Dec. 392.

SATISFACTION OF LEGACIES, WHEN OCCURS: See *Hansbrough's Ex'rs v. Hooe*, 87 Am. Dec. 659, and note; *Zeigler v. Eckert*, 47 Id. 428; *Cloud v. Clinckbeard's Ex'rs*, 48 Id. 397, and note.

MAYOR ETC. OF SAVANNAH v. CULLENS.

[88 GEORGIA, 334.]

ACTION ON CASE WILL LIE AGAINST MUNICIPAL CORPORATION for damages caused by its failure to perform some duty cast upon it by law.

INDIVIDUAL CORPORATOR MAY SUE MUNICIPAL CORPORATION.

MUNICIPAL CORPORATION IS BOUND TO KEEP IN REPAIR PAVEMENT IN FRONT OF STALLS OF MARKET, which it owns, and from which it derives a revenue in the way of rents, although it is unable from lack of funds, without its fault, to repair its streets.

CASE by Miles D. Cullens and Ann M. Cullens, his wife, against the city of Savannah, to recover damages for injuries sustained by Mrs. Cullens by falling into a hole or inequality in the pavement of a public market of the city, on January 6, 1866. The hole was in front of one of the stalls of the market, and appeared to have been made by the removal of a stone. It was about a foot square, and from four to six inches deep. Mrs. Cullens had made a purchase at the stall, and in

turning away stepped into the hole and fell, breaking the neck of her thigh bone and permanently crippling her. The city owned the market and rented the stalls. At the time of the accident the city was in a chaotic condition, resulting from the war, without money with which to make repairs. The plaintiffs had a verdict. The questions in the case, which arose upon the charge to the jury, appear in the opinion.

Edward J. Harden, for the plaintiff in error.

Thomas E. Loyd, for the defendant in error.

By Court, McCAY, J. Although there may be found *dicta* that a corporation cannot be sued for a tort, yet the authorities in support of the contrary doctrine are numerous and conclusive: Angell and Ames on Corporations, secs. 382-385. Nor does a municipal corporation form any exception. The case of *Mayor of Lynn v. Turner*, 1 Cowp. 86, was against a municipal corporation for failing to repair and clean out a creek; indeed, the old cases of suits against corporations for torts (that is, actions on the case for negligence) are almost all against municipal corporations: See the cases cited in *Yarborough v. Governor*, 16 East, 6.

If the wrong be a mere breach of public duty, and no damage to any one, no action lies: *Harris v. Baker*, 4 Maule & S. 27.

As corporations almost always act by their agents, and as they, like private persons, are not liable for the willful trespasses of their agents, which they have not authorized or adopted, and which are not done in the course of the agent's performance of his duty, but few cases are found of actions of trespass against corporations for actual wrongs done, but the books are full of actions on the case against both public and private corporations, for damages caused by a failure of the corporation to perform some duty cast upon it by law: *Chesnut Hill T. Co. v. Rutter*, 4 Serg. & R. 6 [8 Am. Dec. 675].

2. There is no doubt also that one of the corporators may be the plaintiff in a suit against a corporation. The corporation is itself a quasi person, and even as respects one of its members, has a separate individuality: *Waring v. Catawba Co.*, 2 Bay, 109; *Campbell v. Maund*, 5 Ad. & E. 866.

We think, therefore, that the motion in arrest of judgment was rightly overruled.

3. That there is a general duty upon the city of Savannah

to keep its streets in repair, is, we believe, not questioned. Its defense, or rather its excuse, as to the streets, in this case, was a strong one. The law does not require impossibilities, and there is force in the argument that when all could not be done at once, it was no breach of duty not to select, as the first to be repaired, any particular spot. On the other hand, the market was the property of the corporation, from which it derived a revenue in the way of rents. Why was it not just as much bound to keep that safe as a merchant is the floor of his store? To keep the market in a safe condition, it being property, and used by the city for its revenues, was a private duty. It was the duty of a property holder, and the city stands in this respect upon the same footing as an individual. It must use its own so as not to hurt its neighbors.

Whatever was the condition of the streets, it was its duty not to have a trap, on its private property, by which a citizen was injured. We hold, therefore, that the judge was right in his charge to the jury; that the market stood on a different footing from the streets, and that the excuse presented did not apply to it.

Judgment affirmed.

ACTION ON CASE LIES AGAINST MUNICIPAL CORPORATION for damages caused by its failure to perform a duty imposed by law: *Clayburgh v. City of Chicago*, 79 Am. Dec. 346; *City of Tallahassee v. Fortune*, 52 Id. 358; and an action of trespass may be maintained against it for acts done in obedience to its orders: *Allen v. City of Decatur*, 76 Id. 692, and note.

LIABILITY OF MUNICIPAL CORPORATIONS FOR DEFECTIVE STREETS AND SIDEWALKS: See *Browning v. City of Springfield*, 63 Am. Dec. 345, and note considering the subject; *City of Chicago v. Powers*, 89 Id. 418, and note collecting prior cases in this series; *Stackhouse v. City of Lafayette*, 89 Id. 450.

LIABILITY OF CORPORATIONS FOR TORTS IN GENERAL: See *Pennsylvania R. R. v. Vandover*, 82 Am. Dec. 520, 523; *Donaldson v. Mississippi etc. R. R.*, 87 Id. 391, 394; *Brokaw v. New Jersey R. R.*, 90 Id. 659, 661, and the notes to these cases.

FIRST NATIONAL BANK OF MACON v. NELSON.

[88 GEORGIA, 891.]

FACTOR HAS NO POWER TO PLEDGE PRINCIPAL'S GOODS, at the common law, for advances made on his own account, and this rule has not been changed by section 2179 of the Georgia code.

DELIVERY IS ESSENTIAL TO CONSTITUTE PLEDGE at the common law, and under section 2110 of the Georgia code, and cannot be dispensed with by merely setting aside the article pledged, or by the pledgor's consenting to act as bailee thereof for the pledgee.

IT IS SUCH EVIDENCE OF NOTICE OF AGENCY AS WILL BIND BANK ADVANCING MONEY TO AGENTS on the security of goods in their possession, where the fact of the agency was advertised in the city in which the bank was situated, and was painted on the agent's sign, and was well known among business men to exist.

BILL in equity by the First National Bank of Macon to enjoin one Holmes from selling certain barrels of whisky under foreclosure of a mortgage against Megrath and Patterson, and for further relief. Holmes made no defense; but the firm of Nelson & Co., of Nashville, Tennessee, were made parties, upon their petition, and contested the claim of the bank. It was agreed that Judge Cole should try the case without a jury, and that if he should have any doubts upon any material fact, he should submit it to a special jury. Megrath and Patterson, grocers and commission merchants at Macon, on December 10, 1867, mortgaged their stock of goods, wares, and merchandise, and choses in action, to Holmes; but the mortgage was not recorded until January 4, 1868. On December 2, 1867, the First National Bank advanced to Megrath and Patterson one thousand dollars on twenty-five barrels of whisky, and took from them the following paper: "Received from the First National Bank of Macon, one thousand dollars as advance by it on twenty-five barrels of whisky, marked 'E,' now stored in our store, on Poplar Street, which whisky we hereby place in its control and possession, to be used by said bank as its own property, for its reimbursement of said amount, with interest, insurance, and all other expenses thereon, should we fail to pay the same when due, to wit, on the fourteenth day of January, 1868; but if paid when due, or before said whisky is disposed of by said bank, for its reimbursement as aforesaid, then the said whisky to be returned to us." Other advances were made as follows: On December 14, 1867, thirteen hundred dollars on fifteen barrels; on December 23d, three thousand dollars on twelve barrels, and twelve casks of bacon; on December 24th, one thousand dollars on ten barrels; and on December 28th, two thousand one hundred and twenty dollars on thirty-five barrels. These advances were made without any knowledge of the existence of the mortgage, and were each evidenced by receipts like the above. Megrath and Patterson were instructed by the bank's agent to set the whisky and bacon apart as the property of the bank; but they were never separated from the rest of the stock. Thirty-one barrels of the whisky, and all of the

bacon, were sold by Megrath and Patterson, but without paying any of the proceeds over to the bank. The mortgage was foreclosed, and a levy made upon the stock in store, whereupon this bill was filed. The whisky belonged to Nelson & Co., by whom it had been sent to Megrath and Patterson to be sold. It was shown that the fact of the agency had been advertised in the daily papers, in hand-bills and circulars, and it had been painted in large letters on the sign of Megrath and Patterson on the side of their store, and printed on their letter-heads. One of the directors of the bank was a member of a firm which knew of the agency; but the director was absent from the city when the advances were made, and did not know of them. The agency was generally known among merchants in Macon. The judge held that no title to the whisky passed to the bank under the contracts, and that the bank could not hold the whisky as a pledge against Nelson & Co., because there was no delivery to the bank, and because the bank had constructive notice of the agency. The judge refused to submit the question of notice to a special jury. The bank assigned error.

Lanier and Anderson, for the plaintiff in error.

James Jackson, and Harris and Hunter, for the defendants in error.

By Court, McCAY, J. 1. The general rule of the common law is, that every man dealing with another in reference to property that other may have in his possession must "take care," *caveat emptor*. The property may be stolen, or borrowed, or pledged, or in the possession of a bailee for some specific purpose, and if so, the party in possession can convey no better or further right than he has himself: Broom's Legal Maxims, 267, 355; Irwin's Code, sec. 2597. There are some exceptions to this rule, as where the property is money, or promissory notes not due, and also cases where the conduct of the true owner is such that he is estopped from setting up his title against an innocent purchaser: *Dyer v. Pearson*, 3 Barn. & C. 42; *Williams v. Barton*, 3 Bing. 145. Clearly, however, the mere permission by the true owner to a third party to have possession is not such an act as estops him: *Dyer v. Pearson*, 3 Barn. & C. 42. Such a rule would place it in the power of every bailee to dispose of the thing with which he is intrusted, and would seriously interfere with the ordinary affairs of life.

Nor is the case of a factor who has goods put in his possession for sale an exception. The goods are not his. He holds them for a specific purpose, and, outside of that purpose, he has no more authority in reference to them than any other bailee has, outside of the purpose for which he holds goods. The goods belong to the true owner. If they be stolen from him, if he lend them, if he deposit them, they remain his, except so far as he clothes another with power over them.

A factor for the sale of goods has only power to sell them. For purposes of sale he is a general agent, and one may deal fairly with him in all matters pertaining to that purpose. Being a general agent for the sale, in all matters within the scope of his agency, his authority is complete. No special orders or limitations of his powers, or directions as to the mode of their exercise, will affect their buying from him without notice, but if he steps outside of the scope of his agency, if he undertakes to affect the principal's title in any other way than by a sale, he is acting without authority, and nothing passes any more than if he had been a mere depositary. A factor for the sale of goods cannot, therefore, pledge them for advances made on his own account. This is the settled doctrine both in England and America, and though there have been, at times, objections made by judges to the justice of the rule, I have not been able to find a single case in which it is denied: *Patterson v. Tash*, 2 Strange, 1182; *Martini v. Coles*, 1 Maule & S. 146; *Rodriguez v. Heffernan*, 5 Johns. Ch. 429; Story on Agency, sec. 113; Paley on Agency, 214-221; 2 Kent's Com. 627.

The case of *Martini v. Coles*, 1 Maule & S. 146, was a stronger case than the one at bar. Martini had consigned to his factor goods for sale; the bill of lading was to the factor and his assigns, and the factor was a large dealer on his own account. The factor pledged the goods to Coles to secure advances to himself, and afterwards became a bankrupt. It was held by the whole court that the plaintiff was entitled to recover.

It was contended in argument here that, admitting this to be the common law, it is a doctrine not suited to the circumstances of this state, and is not, therefore, within the scope of our adopting act. The object of the rule is said by Bailey, J., to be to encourage foreign consignors to send goods to England for sale. Surely, if it will have that effect, this is the very locality where its influence will be a great public good. Consignments from other states for sale here, in our great want of

capital, ought to be encouraged, and the argument is directly in favor of, rather than against, the adoption of the rule. It is exactly suited to our circumstances.

It is said, also, that the rule is repealed by section 2179 of Irwin's Code. That section is in these words: "The principal may recover back money paid illegally, or by mistake of his agent, or goods wrongfully transferred by the agent, the party receiving the goods having notice of the agent's want of authority or willful misconduct."

It will be noticed, in the first place, that this latter clause, which is the portion relied on, is, at best, but a negative pregnant. It does not declare that, in cases where the party receiving the property had no notice, the principal shall not recover.

The fact is, that the section is almost a transcript of section 437 of Story on Agency. The language of Story is: "If an agent tortiously converts the property of his principal, as if he sells or pledges it to a third person without right or authority, the latter will generally be liable equally with the agent for the conversion." He then adds: "This doctrine applies in all cases where the third person knew and participated in the illegal or unauthorized act of conversion." Judge Story does not say, nor does this doctrine of the code say, that the third person will be liable in no other cases.

If the code is to have that meaning, the whole doctrine of agency is altered. It applies as well to a special as to a general agent, and the law of Georgia is, that any person having the actual possession of personal property as the agent of another, no matter for what purpose, can transfer to a third person a good title, unless that third person has notice of the agent's want of authority. We do not think the section has any such meaning. The whole, at least, of article 2 is to be taken together. Section 2168 had provided that the principal was bound by all acts of the agent within the scope of his authority. Section 2170 declares that, in special agencies, persons dealing with the agent should examine his authority. Section 2111 provides that even the pawnee of a promissory note, without notice, is not protected against the true owner. We cannot believe that it was the intention of the legislature, by the negative pregnant of section 2179, to contradict the express language it has used in other parts of the code, and especially in the very article in which the section stands.

Our conclusion is, that section 2179 introduces no new rule. It authorizes a principal to recover back goods wrongfully

transferred by his agent, in cases where the transferee had notice, but it does not change the rules regulating the rights of principals against parties dealing with special agents, or with general agents who act beyond the scope of their agency. These cases stand upon the same footing as do cases where a general agent, with private instructions, disobeys those instructions, and acts improperly with the knowledge of the person dealing with him.

It may not be out of place here to say that in the argument of this case there seemed to be a misunderstanding of the rule, in cases of a general agent, as to the extent of his authority, and as to how far his acts bind his principal. A special agent is one appointed to do a single act, or several specified acts. Every man deals with such an agent at his peril, and is bound to take notice of the agent's instructions: *Story on Agency*, sec. 17. A general agent may either be one clothed with power to do all the principal's business, of every character, or he may be one empowered to do all acts connected with a particular business or employment: *Id.* Now, the rule as to how far the acts of a general agent shall bind his principal is, that he may bind him by any act within the scope of his authority: *Code*, sec. 2168. He may do all acts proper for the accomplishment of the end, or such as are usual in matters of this kind: *Story on Agency*, sec. 60. But he cannot bind the principal by an act outside of the object of his appointment: 2 *Kent's Com.* 619; 3 *Ross's Lead. Cas.*, secs. 150, 151.

2. Section 2110 of the code provides that delivery is essential to constitute a pawn. Indeed, delivery is the very essence of the bailment. At common law, therefore, incorporeal things, though they might be sold or mortgaged, could not be pawned: *Story on Bailments*, sec. 286. Hence the necessity of the special provision of the code for the pledging of promissory notes and evidences of debt: *Code*, sec. 2110. There need not, it is true, in all cases, be an actual moving of the thing, as if it be logs in a stream, or any other article usually delivered by transferring the dominion, but there must be such a delivery as the thing is capable of. The mere setting of a portable article aside, or the pledgor consenting to bail it as the bailee of the other, there being in fact no transfer of the custody, however such acts might in case of a sale amount to delivery, is not sufficient in case of a pledge or pawn, the very essence of which is deposit: *Boleman's Commercial Law*, secs. 673, 674; *Story on Bailments*, secs. 287, 288; *Irwin's Code*, sec. 2110.

3. While, perhaps, the language of Judge Cole is not technically accurate when he says that the facts here amount to constructive notice, yet we are clear that they are such strong evidence of notice as must bind the bank, whether because it must have willfully shut its eyes, or because failure to know, under the facts, was such negligence as that it ought not to be protected, is immaterial.

Judgment affirmed.

FACTOR CANNOT PLEDGE PRINCIPAL'S GOODS AT COMMON LAW: Note to *Bigelow v. Walker*, 58 Am. Dec. 163; *Horr v. Barker*, 70 Id. 791; *Wright v. Solomon*, 79 Id. 196; *Miller v. Schneider*, 92 Id. 535; but may, as far as third persons are concerned, under the factors' acts: Note to *Bigelow v. Walker*, 58 Id. 165.

DELIVERY IS ESSENTIAL TO CONSTITUTE PLEDGE: Note to *Luckett v. Townsend*, 49 Am. Dec. 731.

KILGO v. CASTLEBERRY.

[28 GEORGIA, 512.]

REAL ESTATE MAY BE SOLD AND GOOD TITLE THERETO PASSED, IN GEORGIA, UNDER EXECUTION ON COMMON-LAW JUDGMENT levied after the levy of an attachment, but before judgment on the attachment.

ONE DEFENDANT HAS RIGHT TO PURCHASE PROPERTY OF CO-DEFENDANT AT EXECUTION SALE on a judgment obtained against them both, and will obtain a good title thereto.

EQUITY WILL NOT SET ASIDE EXECUTION SALE ON MERE GENERAL CHARGE OF FRAUD, without specification of fraudulent acts.

ONE OF TWO JOINT OBLIGORS MUTUALLY INTERESTED IN CONSIDERATION HAS RIGHT OF CONTRIBUTION AGAINST THE OTHER, which, it seems, may be reached by process of garnishment at law, where the original obligation is satisfied by a sale under execution of the property of the former.

BILL in equity. The complainant, T. H. Kilgo, sued out an attachment against Benjamin F. Castleberry, as a non-resident, and had the same levied on certain lots of land. He afterwards obtained judgment on the attachment. Pending this attachment, one Stork obtained a common-law judgment against Benjamin F. Castleberry and his brother, Richard J. Castleberry, upon their joint obligation, and had a *feri facias* issued thereon, and levied on the lots of land as the property of Benjamin F. Castleberry. The lots were afterwards sold under this *feri facias*, and bought by Richard J. Castleberry for \$165. Subsequently the attachment *feri facias* was levied on the lots as the property of Benjamin F. Castleberry, and sold thereunder to Kilgo for \$60. Kilgo alleged that the lots

were worth \$5,000, and the purchase by Richard J. Castleberry, with notice of the attachment, was a fraud upon Kilgo, and was intended to defeat him in the collection of his debt. The bill was demurred to for want of equity. The demurrer was sustained, and the bill dismissed.

Weir, Boyd, and Wimpy, for the plaintiff in error.

W. P. Price, for the defendant in error.

By Court, McCAY, J. 1. The entry on an attachment of the levy upon land does not create a lien as against a judgment obtained before judgment on the attachment. There was therefore no reason why the common-law judgment should not sell the property. Our attachments are only *quasi* proceedings *in rem*, so that the land can in no proper sense have been locked up by the first levy. In practice, there is in fact no seizure of land by a levy in this state. Nothing is done but the entry and notice to the tenant.

2. Why might not R. J. Castleberry buy at the sale? Public policy would rather promote than forbid bidding, and Mr. Castleberry was interested in having the land bring at least enough to pay the *fi. fa.* That he was one of the co-defendants does not, to our minds, affect his right to bid. So far as the validity of the sale is concerned, we do not see but that the defendant, as whose property the land was sold, might have bid, and if the highest bidder, have been the purchaser. There is no charge that the sale was not duly advertised. Why was not Kilgo present, and himself a bidder?

3. It is true, there is a charge in the bill of fraud, but it is a mere general charge, and states no facts. Equity will not interfere without some specific allegation of facts, which the court may pronounce fraud.

4. If the sale was illegal, complainant has a remedy at law. In every view of it, we think the judge was right.

If it be true that this *fi. fa.* selling the land was a joint debt, both defendants equally interested in the consideration, or if R. J. Castleberry was the principal, we will not say that the complainant may not have his remedy by garnishment. In that case, Benjamin F. Castleberry's land having paid the whole debt, R. J. Castleberry would have been indebted to Benjamin so much for money paid to his use.

Judgment affirmed.

ONE OF SEVERAL JUDGMENT DEBTORS MAY PURCHASE AT EXECUTION SALE property of co-defendant: *Doe ex dem. Robinson v. Parker*, 41 Am. Dec. 614; *Freeman on Executions*, sec. 292, citing the principal case.

STATE EX REL. WARING v. GEORGIA MEDICAL SOCIETY.

[88 GEORGIA, 608.]

ACCEPTANCE OF CHARTER BY VOLUNTARY SOCIETY SUBJECTS IT TO SUPERVISION of the proper legal authorities having jurisdiction in such cases.

CORPORATOR IN PRIVATE CIVIL CORPORATION HAS PROPERTY IN FRANCHISE of which he cannot be deprived without due process of law.

INCORPORATED MEDICAL SOCIETY, UNDER POWER TO MAKE BY-LAWS CONTAINED IN ITS CHARTER, MAY ADOPT BY-LAW PROVIDING FOR EXPULSION OF MEMBER who shall be guilty of ungentlemanly conduct during a session of the society, or shall conduct himself out of the society in such a manner as would render him ineligible to membership; but the society has not an uncontrollable discretion in its construction and enforcement.

VISITORIAL POWER OVER PRIVATE CORPORATIONS, with authority to redress any wrongs which the corporations may inflict upon their members, is vested, in Georgia, in the superior courts of the counties where such corporations are located.

CORPORATOR IS ENTITLED TO RELIEF BY MANDAMUS, where he has a clear legal right which has been violated by the corporation, and there is no other adequate legal remedy to enforce it; and this rule has not been changed by section 3143 of the Georgia code.

INCORPORATED MEDICAL SOCIETY CANNOT JUSTIFY EXPULSION OF MEMBER for doing that which the law not only authorizes but encourages.

MANDAMUS in the superior court of Chatham County. The Georgia Medical Society, which had previously existed for some time in Chatham County, as a voluntary association, became incorporated December 12, 1804. The object of the society, as set forth in its charter, was "for the purpose of lessening the fatality induced by the climate and incidental causes, and improving the science of medicine." It was given "power and authority to make, alter, amend, and change such by-laws as may be agreed on by members of the same, provided such by-laws be not repugnant to the laws or the constitution of this state or of the United States." The ninth by-law of the society provided that "any member who shall be guilty of ungentlemanly conduct during the session of the society, or who shall conduct himself out of the society in such a manner as would render him ineligible to membership, shall be expelled from the society according to the wishes of two thirds of the members present, provided that in every instance specific charges be set forth and handed to the individual at least one month before the society takes action thereon." On September 30, 1868, Dr. James J. Waring, a member of the society, was tried and found guilty upon the charges, preferred by the society, of becoming surety on the official bond of a person of

color, who had been elected clerk of the superior court of Chatham County, "in opposition to the wishes of the entire respectable community, thereby facilitating the qualification for office of said disreputable person, and causing the removal of a responsible and respectable citizen"; and of becoming surety on the bonds of certain colored persons "charged with inciting a riot, and threatening the life of an old and unoffending citizen, thus upholding persons whose seditious characters endanger the peace of the community." Waring was, upon motion, brought before the society, and censured by the president. At the next regular meeting of the society, on October 7, 1868, the matter was again brought up, and it was resolved that Waring be requested to tender his resignation as a member, on or before the next regular meeting. This he declined to do. At a meeting of the society, held October 14, 1868, a preamble and resolutions were passed, setting November 18th as the day on which the society would vote on his expulsion for refusing to resign, and for discourteous behavior towards the society at two former meetings, provided that he might be permitted to resign at any time before that day. Waring addressed a communication to the society, in reply, stating that he could not resign his membership, because it was necessary to his regular standing in the city of Savannah and elsewhere, and to the full and complete enjoyment of the benefits and rights in the pecuniary emoluments arising from the practice of his profession, and disclaimed all intentional discourtesy to the society or its members, and protested against the irregularity and illegality of the course resolved upon as set forth in the preamble and resolutions. The communication was read at a meeting of the society, held October 28th, and placed on file. At the meeting of November 18th, Waring addressed a communication to the society, informing it that he was absent in consequence of severe indisposition, disclaimed any intentional discourtesy to it or its members, and protested against any proceedings upon the preamble and resolutions as unlawful and unjust. A vote was nevertheless taken, and Waring was expelled. A motion to grant a perpetual *mandamus* was refused, whereupon error was assigned.

Hartridge and Chisholm, for the plaintiff in error.

Thomas E. Lloyd, for the defendant in error.

By Court, BROWN, C. J. 1. It was insisted, in this case, that the Georgia Medical Society was in existence long before it

was incorporated, and that its objects were in no way changed by its application for and acceptance of its present charter from the state. This may be very true, but its legal responsibilities were changed by the acceptance of the charter. While it remained a voluntary society, the courts had no jurisdiction over it, if it violated no law of the state, and its members had no property in their membership which the law could protect. But its acceptance of the charter subjected it to the supervision of the proper legal authorities having jurisdiction in such cases: *Dartmouth College v. Woodward*, 4 Wheat. 674, 675; *Fuller v. Plainfield Ac. School*, 6 Conn. 544, 545.

2. When the voluntary society accepted the charter, it became a private, civil corporation, and the corporators, then in being, acquired a property in the franchise, and every person who has since become a corporator has acquired a like property. The property which the corporator acquires is not visible, tangible property; but it is none the less property because it is invisible and intangible. It is not a corporeal hereditament; but it is incorporeal. Blackstone, in his Commentaries, volume 2, page 21, says that incorporeal hereditaments are divided into ten sorts; one of these consists of franchises. Bouvier, in his Law Dictionary, volume 1, page 593, says the word "franchise" has several meanings, one of which he gives as follows: "It is a certain privilege conferred by grant from the government and vested in individuals. Corporations or bodies politic are the most usual franchise known to our law." The law-books are full of the doctrine that persons may have a property in incorporeal hereditaments, franchises, etc.

Property, says Bouvier, volume 2, page 381, is divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like. Blackstone says, volume 2, page 37, it is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession, and to do other corporate acts, and each individual member of such corporation is also said to have a franchise or freedom. We think it well settled, by these and other authorities, that a corporator in a private, civil corporation has a property in the franchise of which he cannot be deprived without due process of law.

8. It was insisted by the learned counsel for the plaintiff in

error that the ninth by-law of this corporation is unauthorized by the charter, and that the corporation is not justifiable in expelling a member for its violation, that to deprive a corporator of his property in the franchise under it is to deprive him of his property without due process of law. We think the ninth by-law a proper one in view of the objects of the society, and we hold that the charter conferred upon the corporation the power to ordain and establish it, and that they have the power to expel a member when a proper case arises under it.

But we hold that the society has not an uncontrollable discretion in its construction and enforcement. They cannot, under pretext of enforcing this rule, take personal or private revenge, or make it the instrument of religious intolerance or political proscription. When a member feels that he is aggrieved or injured by the illegal or oppressive action of the body, it is his right to appeal to the courts for redress and protection; and it is the right and duty of the court to investigate such charges when properly before it, and to judge of the legality of the action of the society in expelling a member or depriving him of any other legal right.

4. The rule of law on this subject is thus stated by Judge Blackstone, volume 1, page 381. The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place where he shall exercise this jurisdiction, which is the court of king's bench, where, and where only, all misbehaviors of this kind of corporations are inquired into and redressed, and all their controversies decided. In this state the same visitatorial power of correcting the misbehaviors of these corporations and deciding their controversies is vested in the superior courts of the counties where they are located, which in England belongs to the king's bench. See *Slee v. Bloom*, 5 Johns. Ch. 366.

It was contended with much zeal and ability, by the able counsel for the defendant in error, that *mandamus* is not the proper remedy, even if we admit that the rights of Dr. Waring have been infringed, or that he has been deprived of them by the illegal action of the society. The rule as laid down by this court in a number of cases is, that a person having a clear legal right under the laws of this state is entitled to the writ of *mandamus*, if he has no other remedy to enforce it: *Mayor etc. of Savannah v. State*, 4 Ga. 26; *Napier v. Poe*, 12 Id. 170; *Habersham v. Savannah etc. Canal Co.*, 26 Id. 665.

But it is insisted that the code, section 3143, has changed this rule, and that *mandamus* does not now lie as a private remedy between individuals to enforce private rights. We do not think this section of the code was intended to deny the writ to the corporator, who is deprived of his rights by the corporation, when he has no other adequate remedy for their enforcement. A corporation having been created, invested with certain powers, and charged with certain duties to be performed for the benefit of the public, is not a private individual in the sense of the word as used in said section of the code, and a corporator whose rights are withheld or violated by the corporation, who is without other remedy, is entitled to the writ.

In *Commonwealth v. Mayor of Lancaster*, 5 Watts, 152, Gibson, C. J., says: "An action to enforce the right could not be maintained against the corporation because performance of a corporate function is not a duty to be demanded by action; and unless recourse could be had to the functionary in the first instance, the relator might have a cause for redress without a remedy." See *Mayor etc. of Savannah v. State*, 4 Ga. 44.

Here the discharge of a corporate duty is treated as an office or function, and the corporation as a functionary. In this sense, no doubt, the legislature in the adoption of the code intended to treat them.

The object of this society, as cited in their charter, was "for the purpose of lessening the fatality induced by climate and incidental causes, and improving the science of medicine." The whole community have an interest in the success of this laudable undertaking; and if the functions conferred by the charter for the benefit of the public are not faithfully performed, and one of the corporators who has no other adequate redress is injured by the conduct of the corporation (the functionary), the courts will grant him relief by *mandamus*.

6. The record in this case shows no sufficient cause to justify the society in expelling Dr. Waring from his rights and privileges as a corporator. He was expelled for doing that which the law of this state not only authorizes but encourages. His offending consists in the fact that he became one of the sureties on the official bond of a colored citizen of his county who had been elected clerk of the superior court of the county by a majority of the legal votes cast at the election for that office, and in the further fact that he became surety on the bonds of

certain other colored citizens, who were charged with the offense of riot, for their appearance at court to answer the charge as the law directs. The very fact that the law requires the clerk of the superior court to give bond and security for the faithful discharge of his duties is sufficient to justify any citizen of the county in becoming one of his sureties, and to protect him in contemplation of law from the imputation of having forfeited his position as a gentleman by so doing.

Again, it is not the object of law to punish citizens of this state, whether white or black, by imprisonment, for offenses of which they have never been convicted. When they are charged with violations of the penal code, the requirement of the law is, that they appear at the proper time and place and answer the charge; and to secure such appearance they are required to give bond and security, and it is only on failure to give the bond that they can be imprisoned. As innocent persons are often confined in prison under charges, because of their inability to give bond, the law favors bail whenever the offense is by law bailable. And the law favors this even in the case of the guilty, till the trial. This is not only best for the public, as it saves the tax-payers the expense of keeping them in jail, but it is just to the accused, who receive the legal punishment for their crimes, if guilty, under the sentence of the court after legal conviction. How, then, does a citizen forfeit his corporate rights as a member of a civil corporation, or his position as a gentleman, by doing an act that is not only encouraged by the laws of his state, but is a positive public benefit?

But it is said Dr. Waring was not expelled for becoming surety on the bonds above mentioned, but for ungentlemanly conduct in the presence of the society. What ungentlemanly conduct? The ninth by-law requires that "specific charges" be set forth and handed to the accused at least one month before the society takes action thereon. What specific charges of ungentlemanly conduct in presence of the society were ever handed to Dr. Waring? What did he say or do in presence of the society to forfeit his position as a gentleman? The record is silent. That silence is significant. That which is material and is not averred by the society in their answer is presumed not to exist. No ungentlemanly conduct in presence of the society is set forth in their response, and this court must presume none existed.

Dr. Waring was convicted of the charges first mentioned, in

reference to the suretyship, and brought formally before the society and censured. To this illegal and unauthorized proceeding he submitted. But not satisfied with this, at the next meeting of the society he was again brought up, and his resignation demanded, and he was given till the succeeding meeting to comply with the imperious and unauthorized demand. This he declined to do. And a preamble and resolutions were then passed setting a future day when the society would vote on his expulsion for refusing to resign, and for discourteous behavior towards the society at two former meetings. In what the discourteous behavior consisted we are not informed by the record. In the mean time, however, the gracious privilege of avoiding expulsion by resignation was still held out to Dr. Waring. When the time came for the much-cherished object, by the infliction of the extreme penalty of expulsion, Dr. Waring was at home, sick, and unable to attend; but he wrote the society, disclaiming all intentional discourtesy to it or its members; and protested against the irregularity and illegality of the course resolved upon, as set forth in said preamble and resolutions. But all to no effect. His expulsion was predetermined, and that determination was executed. A more illegal or unjustifiable proceeding has seldom been brought before a court.

After argument had, and a thorough examination of this case, it is the unanimous judgment of this court that the judgment of the court below be reversed, and the judge of the superior courts of said county is hereby instructed and ordered to grant a peremptory *mandamus*, commanding and compelling the said Georgia Medical Society to restore the said Dr. James J. Waring to all his rights and privileges as a corporator in said society.

BY-LAWS WHICH PRIVATE CORPORATIONS MAY ADOPT: See *Sayre v. Louisville etc. Association*, 85 Am. Dec. 613, and note considering the subject; *National M. F. Ins. Co. v. Yeomans*, 86 Id. 610.

POWER OF CORPORATIONS AND UNINCORPORATED ASSOCIATIONS TO EXPEL MEMBERS: See note to *Hiss v. Bartlett*, 63 Am. Dec. 773; note to *Austin v. Searing*, 69 Id. 677; *Society etc. v. Commonwealth ex rel. Meyer*, 91 Id. 139.

MANDAMUS IS PROPER REMEDY TO RESTORE MEMBER OF CORPORATION OR UNINCORPORATED ASSOCIATION WRONGFULLY EXPELLED: Note to *Dane v. Derby*, 89 Am. Dec. 736; *Society etc. v. Commonwealth ex rel. Meyer*, 91 Id. 139.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

SCOVIL *v.* KELSEY.

[46 ILLINOIS, 344.]

RIGHT TO REDEMPTION MONEY AFTER CONVEYANCE BY PURCHASER AT TAX SALE. — A purchaser at a tax sale acquires an equitable interest in the lands sold; and if they are conveyed by him before the time for redemption expires, his grantee acquires such equitable interest, and a right to the redemption money, if the lands are redeemed, as completely between the parties as by an assignment of the certificate of purchase.

SAME. — BUT IF PURCHASER SHOULD CONVEY SUCH PREMISES TO ONE PERSON, and assign the certificate to another, both being innocent purchasers, the holder of the certificate might, with some reason, insist on a superior right to the redemption money.

UNDER IOWA ACT OF 1861, MARRIED WOMAN CANNOT CONVEY HER REAL ESTATE unless her husband joins in the deed.

PROPER PARTIES PLAINTIFF TO SUIT FOR REDEMPTION MONEY WHERE GRANTEE ACQUIRED NO TITLE. — Where K., a purchaser at a tax sale, conveyed the lands to C., a married woman, who, without her husband joining in the deed, conveyed them to S., and the premises were redeemed, the redemption money being paid to K., it was held that S. took nothing by such conveyance, and that a suit to recover the redemption money from K. should have been brought by C. and her husband.

WRIT of error. This was an action of *assumpsit*, brought by the plaintiff in error against the defendant in error. Judgment for costs was rendered against the plaintiff. The facts are stated in the opinion.

Lyman Lacy, for the plaintiff in error.

S. L. Richmond, for the defendant in error.

By Court, LAWRENCE, J. In this case, Kelsey, having bought a piece of land at a tax sale, sold and conveyed it to

Mrs. Connell, a married woman, who conveyed it to the plaintiff, Scovil, her husband not joining in the deed. After these conveyances were made, the land was redeemed, and Kelsey received the redemption money from the county clerk, and refuses to pay it over to the plaintiff. He did not assign the certificate of purchase, and it does not appear in the record what has become of it, but as he drew the redemption money, it is to be presumed he then presented and surrendered it. He now contends through his counsel that the right to the redemption money attaches to the certificate, and can be transferred only by its assignment, and that his deed conveyed only his contingent interest in the land. The distinction is not well founded. The purchaser at a tax sale, legally held and conducted, acquires an equitable interest in the land, which during the two years is represented by the right to the redemption money if paid, and a conveyance of the land will pass this equitable interest and the right to the money as completely as between the parties as an assignment of the certificate. If a deed were made to one person, and the certificate assigned to another, both innocent purchasers, the holder of the certificate may, with some reason, insist on a superior right to the redemption money. But as against the grantor, we entertain no doubt of the superior right of his grantee.

The only other question is the admissibility of the deed of Mrs. Connell to plaintiff. We have decided in the case of *Cole v. Van Riper*, 44 Ill. 58, that the law of 1861 does not enable a married woman to convey her real estate without joinder by her husband in the deed. The deed to Mrs. Connell gave her an equitable interest in the land, which entitled her to the redemption money when paid as against her grantor; but her deed did not pass that equitable interest to the plaintiff, and as a consequence, did not pass the right to the redemption money. The suit should have been brought by Mrs. Connell and her husband. The circuit court committed no error in excluding this deed, and the judgment must be affirmed.

Judgment affirmed.

PURCHASER AT TAX SALE ACQUIRES LEGAL TITLE TO LAND, SUBJECT TO REDEMPTION by the owner, or some one having an opposing interest therein: *Byington v. Bookwalker*, 74 Am. Dec. 279.

AFTER SALE ON EXEMPTION, PURCHASER MAY, UNDER SOME CIRCUMSTANCES, RECEIVE REDEMPTION MONEY: See note to *Stow v. Gardner*, 71 Am. Dec. 271.

MARRIED WOMAN CANNOT ALIEN HER REAL ESTATE unless her husband joins with her in the deed: *Scott v. Purcell*, 39 Am. Dec. 453; *Purcell v. Goskorn*, 49 Id. 448; *Morrison v. Wilson*, 73 Id. 503. And her deed must be executed in the form prescribed by statute in order to divest her estate: See note to *Morrison v. Wilson*, 73 Id. 593. Compare, generally, note to *Kirkpatrick v. Buford*, 76 Id. 367, 400; *Belford v. Crans*, 84 Id. 155.

THE PRINCIPAL CASE WAS OTTED in *Oglesby Coal Co. v. Pasco*, 79 Ill. 168, to the point that a wife cannot alienate her property, except by joining her husband in the execution of a deed for that purpose, acknowledged in due form of law.

CONNOR v. BERRY.

[46 ILLINOIS, 370.]

HUSBAND IS LIABLE FOR DEBTS OF WIFE CONTRACTED BEFORE MARRIAGE, notwithstanding the fact that the marriage took place after the act of 1861, which was passed to protect the separate property of married women.

WRIT of error. The facts are stated in the opinion.

Stuart, Edwards, and Brown, and McClelland, Broadwell, and Springer, for the plaintiffs in error.

Palmer and Hay, and Herndon and Zane, for the defendants in error.

By Court, LAWRENCE, J. The only question presented by this record is, whether the husband is liable for the debts of the wife contracted before coverture, the marriage having taken place since the passage of the law of 1861, for the protection of married women in their separate property. It is contended for the appellants, with a good deal of plausibility, that as that act secures to a married woman the separate control and enjoyment of her property, the reason of the common-law rule imposing liability upon the husband, and with the reason, the rule itself must be considered as having ceased. But we are not prepared to say the reason has so far ceased as to justify us in overturning, by judicial construction, a rule so firmly established in our law. All that can be truly said is, that the act of 1861 has, in part, abolished the grounds upon which the courts and text-writers have placed the liability of the husband, but it has not wholly done so. That liability rests not merely upon the fact that, by the common law, the husband becomes, upon marriage, the owner of his wife's personal property, when reduced to possession, and of a life estate in her realty, but also upon the ground that he is entitled to the en-

tire proceeds of her time, industry, and skill. As a means of paying her debts, it can hardly be said that her earnings are of less consequence than her accumulated property. In most cases in this country they would be of far greater. Yet this court has held, in *Bear v. Hays*, 36 Ill. 280, and in several subsequent cases, that, notwithstanding the act of 1861, the husband is still entitled to the wife's earnings. So it has held in *Cole v. Van Riper*, 44 Id. 58, that he still has a qualified tenancy, by the curtesy, in her lands. With these legal incidents of marriage still existing, we cannot say the legislature intended by the act of 1861 to relieve the husband from the obligation to pay his wife's debts imposed upon him by the existing law.

Judgment affirmed.

SEPARATE PROPERTY OF WIFE IS LIABLE FOR HER DEBTS CONTRACTED BEFORE COVERTURE: *Callahan v. Patterson*, 51 Am. Dec. 712, note 717.

THE PRINCIPAL CASE WAS APPROVED and applied in *McMurtry v. Webster*, 48 Ill. 123, 124. The common-law liability of the husband for the debts of the wife contracted before marriage was held in Illinois to rest not only upon the fact that he, upon marriage, became the owner of her personalty, when reduced to possession, and of a life estate, in her realty, but upon the fact that he was entitled to her labor, skill, and earnings after the marriage, and should therefore pay her debts contracted before their marriage: Id.; *Martin v. Robson*, 65 Id. 138. But the statute of 1869 took from the husband all control over the earnings of his wife, and thus swept away the last vestige of the reasons upon which the common-law rule rested, and the rule itself ceased: *Howarth v. Warmser*, 58 Id. 49

PEOPLE FOR USE OF GREGG v. PALMER.

[46 ILLINOIS, 396.]

HOW TO LEVY EXECUTION WHERE DEFENDANT IS PRESENT—WAIVER OF DEFENDANT'S CLAIM OF EXEMPTION.—A sheriff, whenever practicable, should, before he levies an execution, notify the defendant of his having such execution in his hands; and the defendant upon such notice must, if he claims the benefit of the statute exempting from execution his personal property and the land on which he resides until the rest of his property in the county is exhausted, furnish the officer with a description of his other property liable to sale on execution, or he will be considered to have waived his rights under that statute.

EFFECT OF DEFENDANT'S FAILURE TO EXERCISE RIGHT OF SELECTION.—Upon defendant's being notified by the sheriff that the latter has an execution in his hands to levy, the former has a right to select such property as he desires to retain under the statute, surrendering to the officer all his other property not thus selected or specifically exempt, for the satisfaction of the execution; and if the defendant so neglects or re-

fuses to make a selection of property, the officer may proceed to levy upon any of his property not specifically exempt, and sell it, regardless of any claim the defendant may subsequently set up to such property as having been selected by him.

HOW TO LEVY EXECUTION. WHERE DEFENDANT IS ABSENT—DEFENDANT'S RIGHT TO SELECT AFTER LEVY.—Where the defendant is absent from the county while the sheriff has an execution in his hands for service, and cannot therefore be notified, it is the sheriff's duty to make a levy on all of defendant's property not specifically exempt, and the defendant may thereafter make his selection of the very property levied on precisely as he might have done before the levy, provided it was such in quality and value as he might have selected before the levy. But in such case, the defendant should surrender, or offer to surrender, an amount of other property sufficient to satisfy the execution; and neglecting to do this, the officer may proceed with the sale, if the aggregate value of the property levied on and afterwards selected, and that still retained by the defendant and not specifically exempt from execution, exceeds sixty dollars. If it does not exceed this amount, the officer will be liable to the penalty of the statute if he sells such property.

SHERIFF'S LIABILITY FOR FAILURE TO LEVY EXECUTION—DILIGENCE REQUIRED.—The law requires at least reasonable diligence of a sheriff in levying an execution; and where he receives the writ from a foreign county against a party defendant residing in his county, who is in possession of land of sufficient value, in excess of the encumbrances upon it, to make the debt, he is guilty of negligence if he fails to make a levy upon the land and to file a certificate of the same in the recorder's office of his county, though the execution plaintiff has not furnished him with any funds to pay the fees for filing and recording the certificate of levy. The sheriff's duty is to levy on the land and make his certificate to the clerk. This will exonerate him, and the question of fees is between the clerk and execution plaintiff. An omission to make the levy, and to make and file the certificate thereof, will deprive the execution plaintiff of his lien on the land.

FACT THAT SHERIFF IS INFORMED THAT PERSONAL PROPERTY FOUND IN DEFENDANT'S POSSESSION is not the property of the defendant, will not exempt him from liability for not levying an execution upon it, if it afterwards appears that the property at the time was the property of the defendant.

FAILURE TO LEVY EXECUTION, HOW JUSTIFIED—BURDEN OF PROOF.—If a sheriff fails to make a levy on the personal property in the possession of the defendant, he can only discharge himself from liability by showing that the property was not subject to levy, and the *onus probandi* is upon the officer.

MEASURE OF DAMAGES AGAINST SHERIFF FOR FAILURE TO LEVY EXECUTION is the actual damages sustained by the execution plaintiff, and such damages may be recovered by an action on the sheriff's official bond.

APPEAL. The facts are stated in the opinion.

Morrison and Epler, for the appellants.

I. J. Ketchum and Henry E. Dummer, for the appellees.

By Court, ~~BARNES~~, C. J. This was an action of debt, commenced in the circuit court of Morgan County by the people of the state of Illinois against Smith M. Palmer, as sheriff of Morgan County, and John H. Carver and Samuel Rhea, his sureties on his official bond.

The charge in the declaration is, that a certain execution in favor of Gregg and Hughes, as partners, and against William D. Powell and Samuel T. Crawley, issued out of the clerk's office of the circuit court of Cook County on the 26th of January, 1866, came duly to the hands of Palmer, as sheriff of Morgan County, to be executed, on the eighth day of February, 1866, and that Crawley, at that time, was living in Morgan County, and continued to reside there during the lifetime of the execution, having property liable to levy and sale sufficient to satisfy the execution; but that Palmer neglected to levy the *fi. fa.*, but held it till April 28, 1866, at which time he falsely returned it, "no property found." The second breach is, after stating that Powell was insolvent, and did not reside in Morgan County, that Crawley was a resident thereof, and for thirty days from the date of the delivery of the *fi. fa.* up to March 12, 1866, was in possession of 207 acres of land, more or less, in Morgan County, liable to levy and sale under the *fi. fa.*, of sufficient value to pay the judgment, interest, and costs, had the same been exposed to sale; that it was the duty of Palmer to levy, and file certificate of levy, and thereby secure a lien on the land; that he failed so to do, having reasonable opportunity to make such levy from February 8 to March 12, 1866, on which last-named day Crawley conveyed the land by deed, which was duly recorded, by which neglect the plaintiffs lost their debt.

The third and fourth breaches are substantially the same.

The defendant Palmer presented his defense in eight special pleas; but the issue was narrowed down to the inquiry, Had Crawley property in Morgan County, real or personal, subject to levy and sale? and was the sheriff guilty of negligence?

That Crawley had both real and personal estate subject to levy is well proved. Though his land may have been encumbered by a prior mortgage, his equity of redemption was subject to levy and sale, and nothing is shown to prevent a levy.

The tract contained 160 acres of land, and the "forty" on which the improvements were were worth one hundred dollars per acre, Crawley himself valuing the whole tract at

eighty dollars per acre during the spring of 1866. There was then on the farm ten or twelve horses, worth one hundred dollars each, some cattle and corn, and a carriage. The farm was three miles from Jacksonville. Another witness said he had six or eight head of horses, or more, some cows and young cattle; horses were used by Crawley's family worth one hundred dollars per head. The defendant saw, himself, five or six horses on the farm, two of which were said to be claimed by a man working on the place. The testimony shows a large amount of personal property, *prima facie* subject to the execution, and it does not appear the necessary effort was made by the sheriff to levy upon any portion of it.

The law is plain on this subject. The first section of the act respecting judgments and executions (R. S., c. 57, p. 300) provides that all and singular the goods and chattels, lands, and tenements, and real estate of every person against whom any judgment has been obtained in any court of record, etc., shall be liable to be sold upon execution to be issued upon such judgment, etc.; other sections (32, 33) of the statute specify the articles of personal property exempt from execution. In view of this principle of exemption, this court held in *Cook v. Scott*, 1 Gilm. 333, as a general rule, that it was the duty of the officer having an execution in his hands, before he proceeds to take or seize any of the personal property of the defendant in the execution, by a levy thereon, to notify such defendant, if practicable, of his having such execution in his hands, and on so doing, the right arises to such defendant to select such property as he desires to retain under the statute, surrendering to the officer all his other property not thus selected or specifically exempt for the satisfaction of the execution.

It was also there held, if a defendant, after notice from the officer, neglects or refuses to make a selection of property, the officer may proceed to levy upon any of his property not specifically exempt, and sell it regardless of any claim the defendant may subsequently set up to such property as having been selected by him.

In this case, the defendant Crawley was absent from the county while the sheriff had the execution, and could not, therefore, be notified. In such case, it was clearly the duty of the sheriff to make a levy on all property not specifically exempt, and thereafter the defendant might make his selection of the very property levied on, precisely as he might have

done before the levy, provided it was such in quality and value as he might have selected before the jury. In such case, however, the defendant should, on notifying the officer, surrender or offer to surrender an amount of other property sufficient to satisfy the execution, and neglecting this, the officer might proceed with the sale, unless the aggregate of the property levied on, and afterward selected, and that retained by the defendant and not specifically exempt from execution, did not exceed the value exempted: *Cook v. Scott*, 1 Gilm. 342, 343.

In *Bingham v. Marcy*, 15 Ill. 290, the same doctrine was held that a sheriff, whenever practicable, should, before he levies an execution, notify the defendant, and the other defendant, upon such notice, if he claims the benefit of the statute which exempts his personal property from sale, must furnish the officer with a description of his other property liable to sale on execution, or he will be considered to have waived his rights under the statute.

To the same effect is the case of *McCluskey v. McNeely*, 3 Gilm. 578. Here is shown a total disregard of the statute, and an inexcusable neglect of duty, for the consequences of which the sheriff is responsible. It is a safe rule to hold that a sheriff failing to levy on personal property in the possession of the defendant can only discharge himself from liability by showing the property was not subject to levy. The *onus* is upon the officer.

The sheriff also neglected to levy upon the defendant's land, worth, at the time he held the execution, at least ten thousand dollars, and though encumbered by a mortgage of less than three thousand dollars, was amply sufficient to satisfy the execution, with a large overplus.

The judgment against Crawley was obtained in a foreign county, and could only be made a lien by the levy of the execution which issued upon it, and filing, by the sheriff, a certificate of such levy in the recorder's office of the county where the land was situated: R. S., p. 305, c. 57, sec. 25. By omitting to make this levy, and making and filing the certificate thereof, the plaintiff in the execution lost his lien on the land.

The excuse for this neglect by the sheriff is, that the plaintiff in the execution had not furnished any funds to pay the fees for filing and recording the certificate of levy. This excuse is wholly insufficient to relieve the sheriff from his responsibility in failing to levy, and making and presenting

his certificate thereof to the clerk to be filed. It was his duty to make a levy on the land, and present the certificate to be filed of record with the clerk of the circuit court, and if the clerk failed to record it, by reason that his fees were not paid, the sheriff had discharged his duty by presenting the certificate for record. The sheriff should have levied on the land at all hazards, and have made a certificate thereof; which, if on being presented to the clerk, he refused to record, the sheriff would be exonerated. He should have presented the certificate of levy to the clerk, for the clerk might, for aught the sheriff could know, have had funds of the plaintiff in his hands to discharge the costs of filing and recording. There appears to be no excuse for failing to levy and to present the certificate of levy. He did none of the acts required of him by the statute, and he must suffer the consequences of his neglect.

These consequences are, such damages as the plaintiffs may show they have sustained, to be recovered by action on his official bond.

For the reasons given, the court should have given for the plaintiffs the eighth instruction asked by them, and for refusing the same, the judgment must be reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

Judgment reversed

DILIGENCE REQUIRED OF SHERIFF IN MAKING LEVY OF WRITS: See notes to *Hargrave v. Penrod*, 12 Am. Dec. 203; *McDonald v. Neilson*, 14 Id. 456.

WAIVER OF PRIVILEGE OF CLAIMING ARTICLES AS EXEMPT BY FAILURE TO CLAIM THEM WHEN LEVIED UPON: See note to *Woods v. Keyes*, 92 Am. Dec. 768; *Bowman v. Smiley*, 72 Id. 738.

TIME FOR DEBTOR TO ELECT OR DEMAND EXEMPT PROPERTY: *Bowman v. Smiley*, 72 Am. Dec. 738; *Lynd v. Pickett*, 82 Id. 79.

THE PRINCIPAL CASE WAS CITED in *Wright v. Deyoe*, 86 Ill. 492, to the point that where a defendant in execution is notified by the officer that he holds the same, and that he will at a certain time and place levy the same upon property, and such defendant neglects and fails by the time named to make his selection under the statute exempting sixty dollars' worth of property suitable, etc., he will lose his right to make a selection on a day subsequent to the levy, and the officer levying upon property not specifically exempt will not be liable for selling the same, regardless of any subsequent selection by the debtor. For other citations of principal case, see note *infra*.

DILIGENCE AND Celerity REQUIRED OF SHERIFFS IN SERVING EXECUTIONS AND OTHER PROCESS, AND THEIR LIABILITY FOR LOSS RESULTING FROM WANT OF SUCH DILIGENCE. — The object of the plaintiff in putting his writ into the hands of a sheriff or constable is, that property of the defendant may be

seized and held to satisfy the exigencies of the writ. The duty of the officer, independent of all instructions, is to proceed to make this seizure; and the officer should not wait until the return day before he levies, for the defendant may remove his goods from the county, or sell them to a bona fide purchaser without notice of the execution, or they may be seized upon an execution or attachment issuing out of a court not of record. Besides, it is the sheriff's duty to make return of the execution and pay over the amount due thereon by the return day. He should, therefore, levy at the earliest day in order to obtain the fruits of the execution. Some of the cases hold that he must use "diligence" in the service of process, or search of property on which to levy attachment or execution: *Hunter v. Phillips*, 56 Ga. 634; *Wakefield v. Moore*, 65 Id. 268; *Henry v. Commonwealth*, 107 Pa. St. 361; others that he must use "due diligence": *Hallett v. Lee*, 3 Ala. 28; *Andrews v. Keep*, 38 Id. 315; *Harris v. Murfree*, 54 Id. 161; *Finnigan v. Jarvis*, 8 U. C. Q. B. 210; others that he must use "reasonable diligence": *Palmer v. Gallup*, 16 Conn. 555; *State v. Porter*, 1 Harr. (Del.) 126; *Commonwealth v. Gill*, 14 B. Mon. 20; *Hutchings v. Ruttan*, 6 U. C. C. P. 452; *Fisher v. Gordon*, 8 Mo. 386; *State v. Owenby*, 49 Id. 71; *Ball v. Badger*, 6 N. H. 405; *State v. Leland*, 82 Mo. 260; *Force v. Gardner*, 43 N. J. L. 417; *Strout v. Pennell*, 74 Me. 260; *Elmore v. Hill*, 46 Wis. 618; S. C., 1 N. W. Rep. 235; *Barnes v. Thompson*, 2 Swan, 313; *Snell v. State*, 2 Id. 343; *Whitney v. Butterfield*, 13 Cal. 336; note to *Hargrave v. Penrod*, 12 Am. Dec. 208; note to *McDonald v. Neilson*, 14 Id. 457; and one case in Tennessee goes so far as to hold that he must exercise "active diligence": *Harwell v. Woraham*, 2 Humph. 524, — "a diligence exceeding that which a man employs in his own affairs." But in Ireland this doctrine is pronounced too strong, and it is there held that a sheriff, who has exercised reasonable diligence in the execution of a writ, is not liable to an action because he did not use extraordinary exertion or provide against an unexpected and unforeseen contingency: *Hodgson v. Lynch*, 1 R. 5 C. L. 353. In Iowa it held that the exercise of such skill and diligence as a reasonable man would exercise in the performance of like duties under the same circumstances is all that can be required of a sheriff in levying upon property under an execution: *Orosby v. Hungerford*, 59 Iowa, 712; S. C., 12 N. W. Rep. 582. He is not bound to the utmost possible diligence to any one litigant, but must have regard for the interest of all who confide process to him to be served. He is not to neglect all his other duties to effect the service of a particular process: *Commonwealth v. Gill*, 14 B. Mon. 20. He is not bound to start on the instant of receiving a writ to execute it, without regard to anything else: *Whitney v. Butterfield*, 13 Cal. 336. As a general rule, a sheriff who has an execution in his hands has until the return day of the writ within which to execute it; but there may be reasons why special diligence should be exercised in a particular case, and an immediate levy made in order to make the process available. Where delay is likely to be fraught with probable danger, the officer must levy within a reasonable time, in view of all the facts and circumstances of the case: *State v. Leland*, 82 Mo. 260; *Tucker v. Bradley*, 15 Conn. 46; *Dayton v. Lynce*, 31 Id. 578. The following rule will probably cover all the degrees of diligence above laid down: "In cases where an officer is called upon by the nature of the service to be performed to find some person or thing, or ascertain some fact, or determine some question, upon an inquiry and investigation to be instituted by him after the process comes into his hands, he is required to exercise reasonable care, skill, and diligence in the performance of the duty, but he is not liable as an insurer": *Strout v. Pennell*, 74 Me. 260, 264.

1. *Officer's General Duty as to Service in Absence of Directions — Action for Damages.* — The duty of a sheriff in levying execution is to seize without delay property sufficient to satisfy the debt and costs. In determining what is a sufficient levy for that purpose, he is left to exercise his own judgment, free from the restraint or control of either the plaintiff or defendant; and he is liable to the plaintiff, on the one hand, if he fails to seize what a reasonable, prudent man would regard as sufficient; and to the defendant, on the other hand, for an unreasonable, unnecessary seizure. He must seize the property of the debtor, if he knows, or can by reasonable effort ascertain, that such debtor has property in his bailiwick liable to seizure on execution; and if none is found, it is his duty to make a seasonable return of that fact on the writ, in his official capacity, as a reason for omitting to serve the precept: *Lawson v. State*, 10 Ark. 28; S. C., 50 Am. Dec. 238; *Elmore v. Hill*, 46 Wis. 618; S. C., 1 N. W. Rep. 235; *State v. Leland*, 82 Mo. 260; *Douglas v. Baker*, 9 Id. 41; *Green v. Lowell*, 3 Greenl. 373; *Hill v. Pratt*, 29 Vt. 119; *State v. Cove*, 49 Mo. 129; *Watson v. Watson*, 9 Conn. 140; *State v. Bondy*, 15 La. Ann. 573; *Marshall v. Simpson*, 13 Id. 437; *Watts v. Deleadermier*, 15 Me. 144; *Tucker v. Bradley*, 15 Conn. 46; *Dayton v. Lynes*, 31 Id. 578; *Hunter v. Phillips*, 56 Ga. 634; *Thompson v. Morris*, 2 B. Mon. 36; *Commonwealth v. Lightfoot*, 7 Id. 298; *Bell v. Commonwealth*, 1 J. J. Marsh. 551; *McKinney v. Craig*, 4 Sneed, 577; *Watson v. Brennan*, 7 Jones & S. 81; *State v. Roberts*, 12 N. J. L. 114; *Kennedy v. Brent*, 6 Cranch, 187; *Garrett v. Hamblin*, 11 Smedes & M. 219; *Wingfield v. Crosby*, 5 Cold. 241; *Bowie v. Brahe*, 4 Duer, 676; *Lindsay v. Armfield*, 3 Hawks, 548; S. C., 14 Am. Dec. 603; *Fletcher v. Bradley*, 12 Vt. 22; S. C., 36 Am. Dec. 324. In using reasonable endeavors to execute process, the officer should inquire for the defendant at his home, and should not rely upon vague inquiries made on the street: *Hinman v. Borden*, 10 Wend. 367; S. C., 25 Am. Dec. 568. He has no right to return *nulla bona* on an execution without making an effort to find property at the residence of the defendant in the execution, or of making any demand of payment or inquiry for property: *Parks v. Alexander*, 7 Ired. 412. He must act on his own responsibility in executing process. The court will not direct the manner of executing it: *Bowie v. Brahe*, 4 Duer, 676. He must take all needful and lawful means to enforce it: *McDonald v. Neilson*, 2 Cow. 139; S. C., 14 Am. Dec. 431. He is bound to execute process in the order received: *Rust v. Pritchett*, 5 Harr. (Del.) 260; and must mark on it the true day on which it comes to his hands, or forfeit the statutory penalty: *Hathaway v. Freeman*, 7 Ired. 109. An officer may refuse to execute civil process until his fees are paid or tendered; but if he accepts, and either expressly or tacitly assumes to execute it without demanding his fees, he must do so as promptly and faithfully as if they had been paid in advance: *Alexander v. State*, 42 Ark. 41. A breach of duty by a sheriff in wholly neglecting to execute an execution does not necessarily preclude or prevent the occurrence of a subsequent breach of duty by his successor, into whose hands the writ may come unexecuted, in neglecting to execute it; nor by the same person holding the office of sheriff under a new election. Therefore, if an execution remains in the hands of a sheriff wholly unexecuted until by a new election he is again charged with the office, it becomes his duty to execute the writ, and make due return; and an omission to perform such duty will constitute a breach of his official bond: *State v. Roberts*, 12 N. J. L. 114. But when a sheriff becomes *functus officio*, he cannot execute writs and process of courts in his possession remaining unexecuted. His mission is completed, and his authority to actively enforce the law is at an end: *Sawinet v. Man-*

well, 26 La. Ann. 280. A constable is bound to the same degree of diligence, in the execution of process where he takes it out himself, as where it is taken out by the creditor or his agent, and put into his hands: *Hearn v. Parker*, 7 Jones, 150. An authorized person, if he undertake to serve process, must, although not specially so instructed, attach property, if openly visible, and is liable for a neglect of that duty. He is *pro hac vice* an officer of the law, but must show his authority, and make known his business when required to do so by the party who is called upon to obey: *Burton v. Wilkinson*, 18 Vt. 186; S. C., 46 Am. Dec. 145; *Flinn v. St. John*, 51 Vt. 334.

The prime object of an action of replevin is to put the plaintiff in possession of the property, and when a writ is sued out and a proper bond given, the officer's first duty is to seize the property and then read the writ to the defendant. Whether the defendant may feel disposed to deliver up the property or not is of no consequence to the officer; it is his imperative duty to seize the property if it can be found: *People v. Wilshire*, 9 Ill. App. 374. Of course, the sheriff may serve process by deputy: *Elmore v. Hill*, 46 Wis. 618; S. C., 1 N. W. Rep. 235; and it is his duty to provide himself with a sufficient number of competent deputies to enable him to execute the mandates of the court within the time prescribed by law: *Hallett v. Lee*, 3 Ala. 28. But it has been held that the mere omission of a deputy to inform the sheriff of having process in hand is not such negligence as to charge the sheriff in case a writ last in hand was executed first: *Whitney v. Butterfield*, 13 Cal. 336. Where a sheriff or constable fails to exercise the diligence and celerity imposed upon him by law in executing process, and damage follows, he and his sureties are liable to an action therefor; or, stated in another form, if, by delay or neglect, he becomes unable to execute a writ which he might have executed, and damage ensues, he and his sureties are liable therefor: *Douglass v. Baker*, 9 Mo. 41; *White v. Wilcox*, 1 Conn. 347; *Frost v. Dougal*, 1 Day, 128; *State v. Roberts*, 12 N. J. L. 114; *McKinney v. Craig*, 4 Sneed, 577; *Wakefield v. Moore*, 65 Ga. 268; *Wheeler v. Thomas*, 57 Id. 161; *Bell v. Roberts*, 15 Vt. 741; *State v. Bondy*, 15 La. Ann. 573; *Bank of Pennsylvania v. Potius*, 10 Watts, 148; *Lindsay v. Armfield*, 3 Hawks, 548; S. C., 14 Am. Dec. 603. He is liable unless he makes a reasonable search after the property of the defendant: *Bell v. Commonwealth*, 1 J. J. Marsh. 550; but the mere fact that the defendant had property will not render the officer liable, if he used reasonable diligence to discover property and could find none: *Fisher v. Gordon*, 8 Mo. 386; *State v. Ownby*, 49 Id. 71; *Force v. Gardner*, 43 N. J. L. 417. -He is liable, however, for a deficiency where he has neglected to levy, on attachment, upon sufficient property to satisfy the debt, where the defendant in the attachment had sufficient property to satisfy the demand, and the sheriff knew it at the time of making the levy: *Ransom v. Halcott*, 18 Barb. 56. So if the officer in whose hands an execution is placed shall, without the consent of the creditor, so delay making a proper levy that the rights of third parties intervene, the creditor has his remedy against the officer: *Davidson v. Waldron*, 31 Ill. 120. In this country the general rule is, that no action against an officer for neglect of duty in serving a writ can be supported without proof of loss sustained by such omission: *McNally v. Kerswell*, 37 Me. 550; *Gains v. Downs*, Harp. 72; *Hunter v. Phillips*, 56 Ga. 634; that even nominal damages cannot be recovered unless an actual injury has been sustained: *Stevenson v. Judy*, 49 Mo. 227. But in England, if the sheriff, having a writ of execution, unnecessarily delay putting it in force, an action on the case lies against him at the suit of the execution creditor, though no actual pecuniary damage has arisen

from the default. If there has been no actual loss, still, in the case of final process, the plaintiff must have nominal damages. It is sufficient in such action, if the jury find that the sheriff could have executed the process and omitted doing so; it need not be expressly found that he ought to have executed it: *Clifton v. Hooper*, 6 Q. B. 468; S. C., 8 Jur. 958; 14 L. J. Q. B. 1. For any injury sustained by reason of a sheriff's failure to discharge his duty in reference to the proper execution and return of final process, when placed in his hands, plaintiff has a remedy by rule as well as action; but a rule absolute is not final and conclusive like a judgment between parties litigant. It is the dealing of the court with its defaulting officer, for whose neglect of duty he is required to pay over to the plaintiff in *feri facias* the amount of his actual injury: *Wakefield v. Moore*, 65 Ga. 268. Where an officer, receiving for service an execution in a foreign attachment suit, neglects to make personal demand on the garnishee within sixty days after the rendition of the judgment, the cause of action against him for the default accrues at the expiration of the sixty days, and not upon the rendition of judgment against the plaintiff in a *scire facias* afterwards brought against the garnishee: *Smith v. Yale*, 50 Conn. 526.

2. *Service of Irregular Process — What Constitutes Service of Execution, and Failure to Execute Process — Service at Unreasonable Hours and on Sunday.* — It is the duty of an officer, in which he will be protected, to obey, without investigating the cause of action, every precept put into his hands for service, which appears on its face to have issued from competent authority and with legal regularity. Consequently, his knowledge of facts evincing the existence of a cause of action does not affect his duty or liability. His duty is to obey the process, not to decide on its validity. It is not his duty to inquire into the regularity of the proceedings. He is not bound to know that there is a judgment on which an execution issued; the execution is his authority and justification for acting. In short, the rule is well settled that a sheriff cannot refuse to serve process regularly issued to him because in his opinion it is defective or irregular. He will be justified in executing irregular, erroneous, or voidable process, where the court has jurisdiction; and cannot set up such defects in excuse for his failure to execute the process: *Martin v. Hall*, 70 Ala. 421; *Stoddard v. Tarbell*, 20 Vt. 321; *Chase v. Plymouth*, 20 Id. 469; *Stevenson v. McLean*, 5 Humph. 333; *Watson v. Watson*, 9 Conn. 140; *French v. Willet*, 4 Bosw. 649; *Commonwealth v. O'Cull*, 7 J. J. Marsh. 149; *Forsyth v. Campbell*, 15 Hun. 235; *Bensel v. Lynch*, 44 N. Y. 162; *Woodruff v. Barrett*, 15 N. J. L. 40; *Cody v. Quinn*, 6 Ired. 191; *State v. Bondy*, 15 La. Ann. 573; *McComb v. Reed*, 28 Cal. 281; *Roth v. Duvall*, 1 Idaho, 149; *Kleinsendorff v. Fore*, 3 B. Mon. 473; *Albee v. Ward*, 8 Mass. 79. Thus the fact that the judgment upon which an execution issued was fraudulently obtained is no concern of the sheriff, so long as it is not reversed, stayed, or enjoined: *Baker v. Sheehan*, 29 Minn. 235. And in case against the sheriff for neglect of his deputy in the service of an execution issued by a justice of the peace, in the plaintiff's favor, upon a recognizance taken pursuant to the statute of 1782, chapter 21, by which the plaintiff lost his debt, where the execution misrecited the recognizance, both as to the sum in the recognizance and as to the time of entering it, it was held that no action lay against the sheriff: *Albee v. Ward*, 8 Mass. 79. The sheriff cannot object that either the judgment or execution is irregular: *Bensel v. Lynch*, 44 N. Y. 162. An execution issuing to a county in which the defendant did not reside, the provisions of the statute of 1827 not having been complied with, was held to be only irregular, and not void, and that it was the sheriff's duty to execute it: *Commonwealth*

v. *O'Cull*, 7 J. J. Marsh. 149. So must he, in Ohio, levy execution issued upon a joint judgment against two parties, of whom only one was served with process; for in that state such judgment is voidable only, and not void: *Newburg v. Munshower*, 29 Ohio St. 617; 8 C., 23 Am. Rep. 769. And a writ which has once been legally issued, and which has then been altered, by inserting a different date and return day, without the consent of the defendant therein, is not thereby rendered void, so as to excuse the officer who served it originally from again making service of it, when delivered to him for that purpose, subsequent to the alteration: *Stoddard v. Turbell*, 20 Vt. 321. Neither will an officer be justified or excused for neglecting to execute an execution in which the command to dispose of the goods of the debtor has been omitted: *Chase v. Town of Plymouth*, 20 Id. 469. An execution issued in one county by a justice of the peace on a justice's execution from another county is irregular, defective, and erroneous, but not void, where the original judgment is in the name of one person for the use of another while the new executions omit the latter recital, where the execution issued to the other county was issued by one justice, while the executions based on it recited the issuance by another justice, and where the certificate required by law is signed by a person as clerk, without saying of what court or county, and is that the justices who had issued executions on the original judgment were justices of his county, without stating the county: *Stevenson v. McLean*, 5 Humph. 332. The sheriff must execute such voidable process: Id. So where, in response to a rule for failure to make the money on an execution, the sheriff showed that an affidavit of illegality had been filed, setting up numerous grounds, and amongst them, that the execution did not follow the judgment, which he felt it his duty to accept, and asked time to procure the affidavit papers, which had been returned to the superior court of the county from which the execution issued, in order to show that he had acted according to law, in a case where it appeared that he acted in good faith, and tried to do his duty, but could not tell what it was best to do, it was held that the overruling of a demurrer to his answer, no traverse having been filed, and the discharging of the rule absolute against him, would not be disturbed: *Perry v. Christie*, 65 Ga. 642.

The irregularity of an execution may be given in evidence in mitigation of damages, but is no bar to an action for failing to obey its mandate: *Commonwealth v. O'Cull*, 7 J. J. Marsh. 149. In Louisiana, however, it has been held that, in executing a writ of possession, the sheriff is bound to consult the petition and the reasons for judgment, if necessary to explain what is uncertain in the decree; and that he will be responsible in damages to the plaintiff, if he neglect or refuse to execute the judgment, if practicable with those explanations: *State v. Bondy*, 15 La. Ann. 573. But while the irregularity of process, and its erroneous and voidable character, will neither prevent an officer from justifying under it, nor justify him in omitting to do his duty in its execution, it is otherwise where there is a total want of jurisdiction in the court over the cause, for the process is then void: *Stevenson v. McLean*, 5 Humph. 332, and Tennessee cases there cited; *State v. McDonald*, 3 Dev. 468; *French v. Willet*, 4 Bosw. 649; *Stoddard v. Turbell*, 20 Vt. 321; *Hill v. Wait*, 5 Id. 124. It has been held that an officer will not be justified in executing void process; as where a search warrant, which could be granted only to seize stolen goods, recited that A had enticed the negroes of B to leave him, and that he was harboring them, and commanded the officer to seize them, for the justice had no authority to issue it: *State v. McDonald*, 3 Dev. 468; but the better opinion is, that he will be justified in executing it,

though he is not bound to do so, and is not liable for neglecting or refusing to do it: *Hill v. Watt*, 5 Vt. 124; *Newberg v. Munshower*, 29 Ohio St. 617; S. C., 23 Am. Rep. 769. Thus a judgment rendered on voluntary confession of the debtor, by a justice of the peace who is related to the creditor within the fourth degree of affinity, is void for want of jurisdiction; and the sheriff may execute execution on the same, and be justified in doing it, though he would not be liable for neglecting or refusing to do so: *Hill v. Watt*, 5 Vt. 124. But it is held that the rule that an officer is not bound to execute void process applies alone to the process in his hands, and does not authorize him to insist or show that the judgment awarding an execution is void: *Perdue v. Dodd*, 1 Lea, 710. The service of an execution is the communication of its contents to the execution defendant, accompanied by or followed with a demand for its satisfaction, and in its natural order precedes the levy of the execution: *Terrell v. State*, 66 Ind. 570; and a failure to make the money on a *fiery facias*, when by due diligence it might be made, is a failure to execute process: *Andrews v. Keep*, 38 Ala. 315. A sheriff may serve an execution at night: *Burton v. Wilkinson*, 18 Vt. 186; S. C., 46 Am. Dec. 145; but in the absence of any special urgency, he will not be justified in making a levy at a late hour in the night: *State v. Thackam*, 1 Bay, 358. Process can neither be issued nor executed on Sunday: *Van Vechten v. Paddock*, 12 Johns. 178; *Butler v. Kelsey*, 15 Id. 177. The levy of an execution on Sunday is void: *Bland v. Whitfield*, 1 Jones, 122. A writ placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at 12:15 o'clock on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at 1 o'clock Monday morning, the sheriff was held not to be guilty of negligence in executing the first writ, — no special circumstances being shown: *Whitney v. Butterfield*, 13 Cal. 336.

3. *What will Excuse or Justify Sheriff or Constable in Refusing or Neglecting to Serve Process — No Negligence.* — In an action against a sheriff, or upon a motion or rule against him, seeking to make him liable in damages for a want of diligence or celerity in serving or executing process regularly placed in his hands, he may plead any matter in excuse or avoidance that will negative the allegation of the want of the diligence and celerity imposed upon him by law: *Hallett v. Lee*, 3 Ala. 28; and may show that a *fiery facias* has been paid in whole or in part, and thereby that the plaintiff has not been injured by his default to the extent claimed: *Wheeler v. Thomas*, 57 Ga. 161; that property which he was directed to levy upon did not belong to the debtor: *Canada v. Southwick*, 16 Pick. 556; *Cowart v. Dumbart*, 56 Ga. 417; *Crosby v. Hungerford*, 59 Iowa, 712; S. C., 12 N. W. Rep. 582; *Dolson v. Saxton*, 11 Hun, 565; or that the defendant had no property subject to levy: Id.; *Bowman v. Cornell*, 39 Barb. 69; that an execution in his hands has been enjoined, although he had it for several years before the decree was made: *McCall v. McRae*, 10 Ala. 313; that the affidavit upon which a writ of assistance issued was insufficient: *Loomis v. Wheeler*, 21 Wis. 271; that he had been engaged in the service of other writs previously delivered to him for service, and that he had consumed no more time in their service than was necessary for that purpose: *Tucker v. Bradley*, 15 Conn. 46; *State v. Blanch*, 70 Ind. 204; that in his opinion the property of the defendant would not sell for enough to pay the expenses of the sale, but he does this at his peril: *In re Mowry*, 12 Wis. 52; that the property of defendant was exempt

from levy and sale: *Terrell v. State*, 66 Ind. 570; *Bonnell v. Bowman*, 53 Ill. 460; *Governor v. Campbell*, 17 Ala. 566; or that the defendant in replevin or execution was insolvent: *People v. Wiltshire*, 9 Ill. App. 374; *Wilson v. Strobach*, 59 Ala. 488. If a sheriff has any reason for not executing a writ of *feri facias* delivered to him, he should make known such reason when he receives the writ, and before the rights of any one can be affected by his refusal to execute it: *Henry v. Commonwealth*, 107 Pa. St. 361. An officer is not chargeable with official negligence where he has used due diligence, although he has failed to discover property which, if found, would have satisfied the execution: *Lowe v. Ownby*, 49 Mo. 71; *Barnes v. Thompson*, 2 Swan, 313; *Force v. Gardner*, 43 N. J. L. 417. A sheriff receiving an execution in favor of a private corporation, of which he is a member, is not liable for neglecting to levy and return it, under a statute prohibiting him from doing so in such a case: *Bank of Rutland v. Parsons*, 21 Vt. 199. To an action against a sheriff for failing to levy a *feri facias* on a particular lot of land pointed out to him by the plaintiff, a plea that he levied on other lands of the defendant sufficient to satisfy the *feri facias* is good: *Lawson v. State*, 10 Ark. 28. A United States marshal is not liable to a surety for omitting to levy on the property of his principal, or for making a false return of no property, although by the omission to levy the surety is eventually compelled to satisfy the judgment. The marshal owes no duty at common law to the surety, and therefore is not responsible to him: *Gregg v. Crawford*, 4 Ala. 180. Under the statute directing the sheriff or other officer having an execution against more than one to levy upon the property of the principal in the first instance, the officer is not liable to an action at the suit of the surety for an omission to levy on the property of the principal, unless the statutory affidavit is made by the surety: *Id.* A sheriff had a *feri facias* founded upon a mortgage upon land made in March, 1861, and though he had time to do so, failed to make the money upon it by the next term, because a third person had been in possession of the land since August, 1861, and had had it assigned and set apart as his homestead, and the sheriff's attorney advised him that he ought not to levy upon the land. The sheriff acted in good faith. The attorney was a respectable one. The true construction of the homestead law was a question of great doubt. And the land was still there as subject as it ever was; and in no event could the plaintiff be injured, except by the delay. *Held*, that the court below erred in making the sheriff pay the *feri facias*: *Green v. Jones*, 39 Ga. 521, Warner, J., dissenting.

A creditor, after the first publication of notice of proceedings in insolvency against his debtor's estate, but before the appointment of assignees, attached furniture in his debtor's house; some of the property in the house was claimed by his wife and other persons, and the assignees, to avoid litigation, and by way of compromise, left with such claimants a part of the property, including that attached. The attaching creditor recovered judgment and delivered the execution to the officer who had attached the goods. He did not levy the execution, and did not return the writ till seven months afterwards; and it was held that the creditor could not recover against the officer for neglecting to levy on the property attached; and could only recover nominal damages for neglect in returning the execution: *Gallup v. Robinson*, 11 Gray, 20. While the constable of a ward, district, or township other than the one where defendant resides may, if he chooses, accept and execute an execution upon a judgment rendered by a justice of the peace, directed to him, he is not obliged to do so, and, in case of his refusal, no action can be maintained upon his official bond for that cause: *Commonwealth v. Lantz*, 106 Pa. St. 643. A

sheriff levied an execution of plaintiff against one K., on property which he left in K.'s possession, who left the state with it, and failed to produce it on the day of sale. It was shown in defense that there were in defendant's office executions against K. older than the plaintiff's, which would have taken the whole of the proceeds if the property had been sold. It was held that plaintiff had sustained no injury, and was not entitled to recover: *Gains v. Downs*, Harp. 72. A *feri facias* and *capias ad satisfaciendum* were both lodged in the sheriff's office, with orders to proceed on the *feri facias*. After levy made, the sheriff was directed to proceed on the *capias ad satisfaciendum*. The goods levied on were sold, and the proceeds applied to older executions. Before the return day of the *capias ad satisfaciendum* the debtor died insolvent, and the *capias ad satisfaciendum* was never executed. It was held that the sheriff was not responsible: *Delisseline v. King*, Id. 357. Defendant to a *capias ad satisfaciendum* deposited in the hands of the sheriff the amount of the debt and costs, and took his receipt, stipulating to return the money if an injunction to restrain further proceedings in the case should be obtained. The injunction was obtained, the sheriff returned the money, and a rule against the sheriff for having failed to execute the *capias ad satisfaciendum* was discharged: *Wilkes v. Hasket*, Id. 490. Where a sheriff has made diligent inquiry and can find no property, he may return the writ before the return day without becoming liable on his official bond, although the defendant, after the return and before the return day, may acquire property: *Henry v. Commonwealth*, 107 Pa. St. 361. Where a deputy sheriff levied upon personal property, but was not directed to levy on real estate, and before sufficient time had elapsed to sell the personal property, the real estate was attached and levied upon by another creditor, it was held that the sheriff was not liable, as he was not bound to levy upon the real estate until the personal property was sold: *Bank of Newbury v. Baldwin*, 31 Vt. 311. Where the statute allows a sheriff sixty days after receiving an execution within which to make a levy and an offer to sell, his delay on account of his duties in relation to prior writs in his hands for fourteen days after receiving an execution to levy the same, does not, in the absence of a direction or notice to levy at once, constitute negligence: *State v. Blanch*, 70 Ind. 204. If a *feri facias* be placed in the sheriff's hands without a *bona fide* intention of selling, or if, when such is the case, the plaintiff, after a levy made upon the writ, enters into a negotiation with the defendant, by which the proceedings are interrupted and the debt lost, the sheriff and his sureties are not liable: *Dorrance v. Commonwealth*, 13 Pa. St. 160. Where, in respect to a *feri facias*, it appears that the defendant's title is not of record, and there is nothing to show that he was in actual possession, or that a reasonably diligent inquiry by the sheriff would have disclosed his ownership, there is no ground to infer the negligence or default of the sheriff: *Force v. Gardner*, 43 N. J. L. 417. For other illustrations showing a want of negligence in the sheriff, see *Myers v. Wilcox*, 44 Ga. 336; *State v. Bradford*, 44 Id. 417; *Dayton v. Lynes*, 31 Conn. 578; *Strout v. Pennell*, 74 Me. 280; *Commonwealth v. Bosley*, 5 Bush, 221.

4. Negligence in Service of Process, What Constitutes — What will not Excuse.

— A sheriff is liable when he does nothing under the writ, and allows it to run out: *Watkinson v. Bennington*, 12 Vt. 404; or where, in consequence of his delay, other creditors obtained prior attachments: *Kittredge v. Bellows*, 7 N. H. 399; or for an insufficient levy: *McKinney v. Craig*, 4 Sneed, 577. If a writ of replevin is placed in his hands for service, and he loses time in trying to find the defendant in order to read it to him, and during the time thus

lost the property is put beyond his reach, so that he cannot take it, he is liable: *People v. Wilshire*, 9 Ill. App. 374. It is no excuse that the consideration of the judgment has failed: *Arnold v. Commonwealth*, 8 B. Mon. 109. An execution running directly against a steamboat is valid in Arkansas, and the sheriff is liable for failing to execute it: *State v. Crow*, 11 Ark. 642. An execution which specially commands him to levy upon certain mortgaged premises, according to description, is a special execution, and it is his plain duty to take and sell the premises described: *State v. Cove*, 49 Mo. 129. It is no defense for his failure to execute a writ that the defendants notified him that they intended to file their bill for an injunction, and that he thought it would be sanctioned: *Dawson v. Merchants' etc. Bank*, 30 Ga. 664; nor that he had already executed another *capias ad satisfaciendum* against the same defendant in favor of a different plaintiff, whereupon the defendant gave bond to take the benefit of the honest debtor's act, and notified the plaintiff in the non-executed *capias ad satisfaciendum* of his intention to take the benefit of the said act: *Porter v. Pierce*, 19 Id. 268. A sheriff holding several writs of *fiert facies* against the same defendant is not excused by a claim interposed against one of them from proceeding with the rest: *Brown v. McCrary*, 30 Id. 878. A bare suspicion that there may be some difficulty with regard to the title to property pointed out will not justify a sheriff in refusing to seize: *Marshall v. Simpson*, 13 La. Ann. 437; nor will the fact that the sheriff was informed by the debtor and his wife and neighbors that the property in his possession belonged to his wife: *Robertson v. Beavers*, 3 Port. 385. Where an officer is indemnified for the seizure of property under an execution, he cannot relieve himself from liability for a failure to subject it to the execution by showing that it was not in fact the property of the execution defendant: *Beams v. Thurston*, 53 Iowa, 122; *contra: Dolson v. Saxton*, 11 Hun, 565. But a promise by a third person to indemnify an officer for neglecting or omitting his duty in the service of a precept, being founded on an illegal consideration, is void on grounds of public policy. It is not a security, and will not protect the officer against the party at whose suit the writ issued: *Cole v. Parker*, 7 Iowa, 167; *Hodsdon v. Wilkins*, 7 Greenl. 113. Where the plaintiff knows that the property which the sheriff has been directed to attach was mortgaged, his omission to mention this fact to the sheriff does not exonerate the latter, unless he can prove that the omission operated to his prejudice: *Roslett v. Blodgett*, 17 N. H. 298. In an action for the sheriff's failure to serve process, it is no defense that the plaintiff's attorney did not see to it, by examining the papers, that such defendant was served: *Ivey v. Colquitt*, 63 Ga. 509. The sheriff is liable where he neglects to levy until too late to make the money on an execution for the next term: *Caruthers v. Sprayberry*, 26 Id. 437; or where he is directed to levy on land for the June sales, and at the instance of the defendant, and in order to enable him to get time to procure an injunction, he fails to make the levy for June, but postpones it until July: *Hunter v. Phillips*, 56 Id. 634. Delays of four days without sufficient excuse: *Abner v. Hill*, 51 Wis. 365; S. C., 8 N. W. Rep. 472; 46 Wis. 618; of eight days, where the defendant lived within ten miles: *Hearn v. Parker*, 7 Jones, 150; from October 7th to November 1st, no reason being assigned: *Lindsey v. Armfield*, 3 Hawks, 548; S. C., 14 Am. Dec. 603; and of six months: *Presch v. Kemp*, 64 Ga. 749, — have been held negligent. In an action against a sheriff and his sureties on his official bond for failure to make money on an execution, it is no defense that the sheriff had in his hands another and prior execution against the debtor, unless that execution had been actually levied: *Abbott v. Gillespy*, 75 Ala. 180; nor that he declined to levy on property in

the possession of the execution debtor because he honestly believed that it was exempt: *Id.* He cannot justify his failure to levy an execution in his hands because of the passage of an act abolishing imprisonment for debt, if such writ could have been executed before the passage of that act: *Douglas v. Baker*, 9 Mo. 41; or by a general report that the debtor had no property, if he had in fact property subject to levy: *Parks v. Alexander*, 7 Ired. 412. Nor can he allege the granting of an injunction as an excuse, where he neglected for six months to sell after levying his *feri facias*: *Neal v. Price*, 11 Ga. 297. Nor can he, in answer to a rule for neglect of duty in levying upon and selling property, set up that he was served by defendant with an affidavit of illegality, which was predicated solely on his own or his deputy's neglect of duty, as no man can take advantage of his own wrong, or that of those under his authority and subject to his control: *Wheeler v. Thomas*, 57 Id. 161.

When notified of property in his county subject to levy, the illness or sickness of the constable at the time furnishes no excuse or defense for not subjecting it to execution. If he cannot act from such cause, his duty is to have the writ placed in the hands of some other constable who can act, or to notify the plaintiff in execution, or the justice who issued it, so that they may place it in the hands of some other officer: *Freudenstein v. McNier*, 81 Ill. 206. A sheriff or constable and his sureties are liable for carelessness and negligence in making an insufficient levy under a writ of attachment: *Alexander v. State*, 42 Ark. 41. A plea which merely states that the execution was levied a short time before the return day, a delivery bond taken and return forfeited without showing a sufficient excuse for the delay, is bad: *Hallett v. Lee*, 3 Ala. 28. Where an officer had attached property on an original writ, and within thirty days after judgment in favor of the plaintiff, the latter delivered the execution to the officer, who neglected to seize and sell such property, and before the return day of the execution the judgment debtor died insolvent, and the officer returned the execution unsatisfied, he was held liable to the creditor for his neglect: *Barnard v. Ward*, 9 Mass. 269. Where a stay of "sales only" was indorsed upon plaintiff's *feri facias*, and the plaintiff's attorney informed the sheriff that the stay was intended to apply only to the sale, and instructed him to levy immediately, it was held that the indorsement on the *feri facias* did not justify the sheriff in failing to make a levy, and that he was liable for neglecting to do so: *Farrar v. Wingate*, 4 Rich. 35. Where a sheriff has seized property under a *feri facias*, and then another *feri facias* against the same defendant comes to his hands, the bare receiving of the latter operates as a constructive levy under it on the property seized under the first; and where, by an arrangement between the first execution plaintiff and the one whose property has been levied upon, the first *feri facias* is withdrawn, and the sheriff neglects to proceed against the property on the second *feri facias*, he will be liable to the second execution plaintiff: *Van Winkle v. Udall*, 1 Hill, 559. It is no answer for a sheriff to say, when sued for negligence in not executing process against a debtor, that the debtor, even after being imprisoned under a *copias ad satisfaciendum*, might pay, or secure to be paid by assignment, other *bona fide* debts to the disappointment of the judgment creditor: *Sherrill v. Shuford*, 10 Ired. 200. A sheriff who receives an execution four days before he goes out of office renders himself and sureties liable if he neglects or omits to levy it after having an opportunity and the means to do so: *State v. Roberts*, 12 N. J. L. 114. A sheriff, having in his hands a writ of assistance lawfully issued, to execute, cannot excuse himself from its execution, because the defendant in the writ claims to hold the pos-

session under a party having a title older than the title of the claimant in the writ: *State v. Giles*, 10 Wis. 101; and when requested or when necessary he must execute such a writ immediately. If he delays for one day, for no good reasons, and against plaintiff's protestations, and in the mean time the tenant has destroyed valuable fixtures, he is liable for the damage done: *Chapman v. Thornburgh*, 17 Cal. 87. Where loss occurs by the insufficiency of sureties in a replevin bond given for attached property, and the sheriff does not even compel them to testify, he is liable on his official bond for his negligence: *Noble v. Desmond*, 14 Pac. Rep. 16. An agreement by an officer to serve a writ for less than the legal fees will not vary his duty respecting it. And in an action against him for neglecting to attach property, testimony showing such an agreement is inadmissible: *Hill v. Pratt*, 29 Vt. 119. Of course, where there is property of defendant in the sheriff's bailiwick subject to execution, and it is pointed out to him, and he is requested to levy an execution upon it, but fails and refuses to levy, and returns the execution unsatisfied, it is a clear case of negligence: *Miller v. State*, 61 Ind. 503. The true inquiry is, Has the sheriff by his negligence deprived the plaintiff of any legal means of securing the payment of his debt? If he has, and the debtor had property which might by due process have been subject to it, the sheriff shall be liable to the amount of the debt which might have been thus secured: *Sherrill v. Shuford*, 10 Ired. 200. For other illustrations under this head, see *Lawson v. State*, 50 Am. Dec. 238; *Phillips v. Ronald*, 3 Bush, 244, S. C., 96 Am. Dec.

5. *Directions and Instructions to Officer, Effect of, with Respect to Service of Process.*—Sheriff's failure to levy immediately when directed to do so by the plaintiff renders him liable for the consequences, if loss ensues: *Hunter v. Phillips*, 56 Ga. 634; *Tucker v. Bradley*, 15 Conn. 46; *Kittredge v. Bellows*, 7 N. H. 399; and a sheriff receiving specific instructions as to attachment of property, or levying execution upon it, is bound, as held in some cases, to follow them, if he can lawfully do so; and it is no excuse from liability to show merely that he acted in good faith: *Smith v. Judkins*, 60 N. H. 127; *Ranlett v. Blodgett*, 17 Id. 298; *Ball v. Badger*, 6 Id. 405; *Farrar v. Wingate*, 4 Rich. 35. When directed to attach certain real estate of the debtor, under mortgage, he is liable for suffering other creditors to obtain prior attachments on the right to redeem: *Kittredge v. Bellows*, 7 N. H. 399. An officer, having in his hands the proceeds of a sale of goods attached on a writ, is bound to levy on the same, without specific directions, when the execution in the action is given to him: *Lucier v. Pierce*, 60 Id. 13; but he is not liable to the creditor, as held in one case, for not attaching real estate of the debtor which the creditor never directed him to attach: *Palmer v. Gallup*, 16 Id. 555. On the other hand, however, it has been held that, though the plaintiff points out property to be levied on, this imposes no obligation to levy on that particular property to the exclusion of or in preference to other property: *Lawson v. State*, 10 Ark. 28; S. C., 50 Am. Dec. 238; that an officer is not bound to make a special service of a writ, by attaching property, without written directions to that effect from the plaintiff, or his agent or attorney: *Betts v. Norris*, 15 Me. 468; and that no parol instruction of the plaintiff, in an attachment or execution, respecting property seized by the sheriff under either writ, will discharge the sheriff from liability, as the statute is express that such instruction must be in writing: *Sanford v. Boring*, 12 Cal. 539. An execution creditor, or his counsel, is not bound to point out property to be levied on: *Albany City Bank v. Dorr*, Walk. Ch. 317; *Batte v. Chandler*, 53 Tex. 613; though he is expected generally to de

so: *State v. Owenby*, 49 Mo. 71; *Hutchings v. Rutlan*, 6 U. C. C. P. 452; and his not doing so does not relieve the sheriff from responsibility, if, through information from others, or by reasonable inquiries and diligence, he can ascertain whether the defendant has property subject to execution. If he has such knowledge, no matter how obtained or known, and fails to levy upon it, he will be liable: See cases last cited; *Garrett v. Hamblin*, 11 Smedes & M. 219; *Chase v. Town of Plymouth*, 20 Vt. 469. But if the sheriff has no such knowledge, and applies to the plaintiff or his counsel to point out property from which to satisfy an execution, and knowledge in their possession is withheld from the officer, and which, if known, would enable him to make a levy, that fact would exonerate the sheriff from liability: *Batte v. Chandler*, 53 Tex. 613. Of course, where, by following directions and instructions, the officer could make a levy, and fails because he does not heed or follow them, he is clearly liable: *Kimball v. Davis*, 19 Me. 310; *Abbott v. Jacobs*, 49 Id. 319. Where sufficient directions have been given to an officer to attach property, and he has neglected to make an attachment, and the debtor becomes insolvent before judgment is recovered, the sheriff is liable, though the execution was not placed in the hands of an officer within thirty days from the rendition of judgment: *Abbott v. Jacobs*, *supra*. So when an officer ordered to attach real estate neglects to do so, and it is conveyed by the debtor before judgment on the action, he is liable for official neglect, although the execution was not placed in the hands of an officer within thirty days from the rendition of judgment. If, however, in such a case, there was real estate of the debtor remaining on which a levy might have been but was not made, the value of such real estate should be allowed in reduction of damages: *Townsend v. Libbey*, 70 Id. 162. The direction, "Mr. Officer, attach suft," indorsed upon a writ, although not signed, is sufficient: *Abbott v. Jacobs*, 49 Id. 319. So the words, "Mr. Officer, attach suft," on the back of a writ, sufficiently indicate to the officer that an attachment should be made: *Kimball v. Davis*, 19 Id. 310. In pointing out property to a sheriff to seize, it is sufficient to inform him where the property is: *Marshall v. Simpson*, 13 La. Ann. 437. Verbal directions as to the articles or species of property to be attached are binding on the officer, when general directions in writing to attach have been given: *Kimball v. Davis*, 19 Me. 310. For other illustrations under this head, see note to *McDonald v. Neilson*, 14 Am. Dec. 457; *Kirkpatrick v. Black*, 36 Id. 182; *Fletcher v. Bradley*, 36 Id. 324; note to *Root v. Wagner*, 86 Id. 351.

6. *Criminal Process*. — A sheriff cannot be ruled out of the county of his residence for failure to execute a criminal warrant therein. Whether an attachment be a civil or criminal proceeding, the county of his residence is the proper venue of the case: *Sheffield v. State*, 69 Ga. 730; and in an action of trover where bail is required, though the sheriff fails to arrest the defendant, or to seize the property sought to be recovered, or to take a bond as required by the statute, he cannot by an order of court be charged as special bail, and have judgment entered against him as such bail along with the defendant in the suit. The court has no such authority under the statute: *Gladden v. Dowier*, 71 Id. 381; *Outlaw v. Gilmer*, 27 Id. 365. A statute requiring the sheriff to notify the bail fifteen days before the return day of the execution does not excuse the sheriff from making diligent search for the body and goods of the debtor as before: *Kidder v. Parlin*, 7 Greenlf. 80. But where a judgment creditor told the officer who had charge of his execution to do the best he could with it, and that he, the creditor, would take no advantage, this was held a good defense for the officer in an action on the case against

him by the judgment creditor, for not arresting his debtor in execution: *Walker v. Haskell*, 11 Mass. 177. A sheriff was held to be negligent where he had a writ against a resident of another state, who was known by the sheriff to be in his county upon a temporary visit, and such sheriff was also informed, by one of whom he inquired, that the person sought would be at a particular place, near the county line, on a certain day named, on his way out of the state, and he failed to be present on the day mentioned, when, if he had been there, he might have arrested the defendant, and where he showed no reasons for not going there: *State v. Troutman*, 5 Jones, 379; S. C., 7 Id. 169. But a sheriff is not liable for negligence in failing to make an arrest on bail process, where he used due diligence in his effort to find one against whom bail process had been lodged, and who resided in the country, merely because, while he was absent making the effort, his office was closed, and before he returned the defendant came to the court-house, and there took the cars and left the state. In such an action, plaintiff cannot recover for the sheriff's default in keeping his office closed, unless such default is charged in his pleadings: *Ervin v. Scott*, 15 Rich. 12. An officer is not bound to find a defendant to arrest him, unless he can be found by "reasonable diligence." The officer does not warrant that he will find him. After a diligent search he may return *non est inventus*, although the defendant may really be within the officer's precinct: *Strout v. Pennell*, 74 Me. 264. A prosecuting attorney has no control over a writ which has been put into the sheriff's hands for execution. The sheriff may take his advice if doubtful as to his duty, but is not relieved from responsibility if he fails in his duty by following such advice: *Beecher v. Anderson*, 45 Mich. 543. For other illustrations under this head, see *Blodgett v. Town of Brattleboro*, 30 Vt. 579; *Fletcher v. Bradley*, 36 Am. Dec. 324.

7. *Measure of Damages for Negligence in Serving Process.*—The measure of damages against a sheriff, in the absence of statutes affixing penalties, for neglect of duty in failing to levy an attachment, execution, or other process, is the actual loss or injury sustained by the creditor in consequence of that failure. If the whole debt is lost, then the amount lost is the injury. If the whole debt is not wholly lost, then only damages to the extent of the injury are to be allowed, and this is for the jury to determine upon the evidence: *Dolson v. Saxton*, 11 Hun, 565; *Arnold v. Commonwealth*, 8 B. Mon. 111; *Bondurant v. Lane*, 9 Port. 484; *Marshall v. Simpson*, 13 La. Ann. 437; *State v. Miller*, 48 Mo. 251; *State v. Cave*, 49 Id. 129; *Dorrance v. Commonwealth*, 13 Pa. St. 160; *Sherrill v. Shuford*, 10 Ind. 200; *Blodgett v. Town of Brattleboro*, 30 Vt. 579; *Wakefield v. Moore*, 65 Ga. 268; *Ivey v. Colquitt*, 63 Id. 509; *Bowman v. Cornell*, 39 Barb. 69; *State v. Lowrance*, 64 N. C. 483; *Clifton v. Hooper*, 6 Q. B. 468; S. C., 8 Jur. 958; 14 L. J. Q. B. 1; *Commonwealth v. Lightfoot*, 7 B. Mon. 298; *Hearn v. Parker*, 7 Jones, 150; *Abbott v. Gillespy*, 75 Ala. 180. In this country, no damage can be recovered unless the plaintiff shows an indebtedness of the defendant in the original action: *Webster v. Quimby*, 8 N. H. 382; or proves that he has sustained loss by the omission or negligence of the officer: *McNally v. Kerswell*, 37 Me. 551. But in England, it seems, that though there be no actual loss, still, in the case of final process, the plaintiff must have nominal damages: *Clifton v. Hooper*, 6 Q. B. 468; S. C., 8 Jur. 958; 14 L. J. Q. B. 1. With us, it is competent for the defendant sheriff, or his sureties, to prove that the plaintiff has sustained no injury: *Abbott v. Gillespy*, 75 Ala. 180; or that if he was injured, it was on account of his own conduct: *State v. Cave*, 49 Mo. 129; *Bank of Rome v. Curtiss*, 1 Hill, 275. While actual damage only is recoverable where the

officer has acted in good faith, *Blodgett v. Town of Brattleboro*, 30 Vt. 579, the whole debt may be allowed where his neglect was willful and with a view to injure the plaintiff: *Hodsdon v. Wilkins*, 7 Greenl. 113. The old rule was that an officer who had been guilty of neglect in not serving mesne process, as well as final process, should be liable for the whole debt: *Douglass v. Baker*, 9 Mo. 41; *Green v. Lowell*, 3 Greenl. 373. This was, however, a rule rather of stern policy than of exact justice: *Palmer v. Gallup*, 16 Conn. 558; and was applied only in cases where the officer had done nothing under the writ that operated as an immediate and necessary benefit to the creditor: *Watkinson v. Town of Bennington*, 12 Vt. 404. But now, when the actual loss or damage sustained equals the whole debt, it of course may be allowed. A sheriff is liable for the value of land he is notified to levy on and sell under an execution founded upon a debt for the purchase-money of land claimed as a homestead, where he is notified in writing of the facts, and fails to levy: *Baker v. Bower*, 44 Ga. 14. The measure of damages for a failure to levy upon real estate, or for making a void levy, is the actual value of the real estate thus lost by the officer's negligence: *Parker v. Peabody*, 56 Vt. 221; *Harris v. Murfree*, 54 Ala. 161. Irregularity of execution may be given in evidence in mitigation of damages, but is no bar to an action for refusing to obey its mandate: *Commonwealth v. O'Cull*, 7 J. J. Marsh. 149. For failure to levy an execution a sheriff and his sureties are not liable to strangers to the writ who may suffer consequential injury, — as to a mortgagee of the debtor's lands, which, by reason of failure to levy on chattels, results in a sale of the lands, thus depriving the mortgagee of his security: *State v. White*, 88 Ind. 587. Interest: *Bondurant v. Lane*, 9 Port. 484; *Mitchell v. Commonwealth*, 37 Pa. St. 187; and costs: *Miller v. State*, 61 Ind. 503; *Lewis v. Hamilton*, 1 Hemp. 21; *Mitchell v. Commonwealth*, 37 Pa. St. 187, — have been allowed as damages against a sheriff for his negligence in not levying process. Where the sheriff's negligence in failing to levy process causes slight loss only, nominal damages only are allowed: *State v. Emmons*, 99 Ind. 452; *Selfridge v. Lightgown*, 2 Mass. 374; *Bell v. Roberts*, 15 Vt. 741. The sureties of a sheriff are not liable for the statutory penalty imposed for his neglect to levy, but only for the actual damages sustained: *Glascocock v. Ashman*, 52 Cal. 493. Damages for a sheriff's omission to serve process are in their nature unliquidated: *Schwab v. Coots*, 44 Mich. 463. In an action against an officer for neglect of duty on mesne process, the rule of damages is the injury actually sustained, and not the amount of the debt, unless they are both equal: *Clark v. Smith*, 9 Conn. 379. The distinction sometimes made on this subject between the case of mesne process and that of final process is one rather of practice than of principle, actual damage being essential to a right of action in both cases; and the only difference being that in the latter case damage is presumed, but may be disproved, while in the former case it must be proved: *Bank of Hartford County v. Waterman*, 26 Id. 324. The measure of plaintiff's damages in an action against a sheriff for neglecting his official duty in arresting a defendant is the injury sustained: *Pugh v. McRae*, 2 Ala. 393; *Goodrich v. Starr*, 18 Vt. 227; *Danforth v. Pratt*, 9 Cush. 318; *State v. Troutman*, 5 Jones, 379; S. C., 7 Id. 169; see *Phillips v. Ronald*, 3 Bush, 244, S. C., 96 Am. Dec., on this head.

8. *Failure to Return, or False Return — Amercement of Sheriff.* — *Nulla bona* may be returned if goods are not found by the exercise of ordinary skill and diligence by the officer, whether the defendant had them or not: *Strout v. Pennell*, 74 Me. 264; *Cross v. Williams*, 63 How. Pr. 191. But for a false return or no return at all the officer is liable to the execution creditor: *Hutch-*

injs v. Ruttan, 6 U. C. C. P. 452; *Norton v. Valentine*, 15 Me. 36; *Bowie v. Brahe*, 4 Duer, 676. A return of *nulla bona* or *non est inventus* is not a false return, unless it appears that the sheriff is informed that the defendant has goods in the county, and that the officer has had an opportunity, or a reasonable time, in which to make the levy. But if this does appear, such a return is false: *Dougal v. Frost*, 1 Day, 128; *Trigg v. McDonald*, 2 Humph. 386. It has been held in one case that the creditor has no action on the case against a sheriff for a failure to return an execution within the time commanded, after complete service of the same, without proof of actual loss: *Fletcher v. Bradley*, 12 Vt. 22; S. C., 36 Am. Dec. 324; but in another that the sheriff is liable to such an action, although the judgment creditor suffered no injury by such neglect: *Goodnow v. Willard*, 5 Met. 517; and nominal damages have been allowed for not returning an execution within the time prescribed by law, whether served or not: *Webster v. Quimby*, 8 N. H. 382; *People v. Johnson*, 4 Bradw. 346; *Smith v. Perry*, 18 Tex. 510; S. C., 70 Am. Dec. 295. But mere failure to make such return is ground for nominal damages only. A greater recovery can be had only where special damage is shown: *State v. Black*, 70 Ind. 204. For slight loss, nominal damages are allowed: *Gallup v. Robinson*, 11 Gray, 20. The general rule is, that for non-return or a false return of process, the plaintiff's actual injury and loss sustained by such omission or act is the only proper criterion of damages: *Norton v. Valentine*, 15 Me. 36; *Clark v. Smith*, 10 Conn. 1; *Hamilton v. Marsh*, 2 Tyler, 403; *Commonwealth v. Bradley*, 4 J. J. Marsh. 209; *Lovett v. Pike*, 41 Me. 340; S. C., 66 Am. Dec. 248. Yet this rule will not, under some circumstances, prevent the full amount of an execution from being the measure of damages: *Dunphy v. Whipple*, 25 Mich. 10; *Ackley v. Chester*, 5 Day, 221; *Bowman v. Cornell*, 39 Barb. 69. The defendant, however, may, in an action for failure to make money on an execution, show in mitigation of damages that the defendant in execution had no property subject to levy and sale under the execution; or that his property was encumbered by mortgage or other lien, of the existence of which the plaintiff was charged with notice: *Abbott v. Gillespy*, 75 Ala. 180; or, in an action for a false return, that a debtor was in extreme sickness and poverty, and though the return that he had taken bail from him was false, that the debtor after recovering his health did not conceal himself: *Weld v. Bartlett*, 10 Mass. 469; or, in an action for not returning a writ of attachment, that the property attached was subject to prior encumbrances to nearly its value, and that the debtor had no other property liable to attachment, and had absconded: *Clark v. Smith*, 9 Conn. 379; or that, in an action for failure to return, the plaintiff has sustained no injury: *Smith v. Perry*, 18 Tex. 510; S. C., 70 Am. Dec. 295. As to justification of officer under writ which he has failed to return, see extended note to *Williams v. Babbitt*, 74 Am. Dec. 672. It has been held that, in a proceeding by a judgment creditor against a sheriff and his sureties for failure to return an execution within the proper time, it is no defense that the defendant in the execution was insolvent, and that the plaintiff was therefore not damaged: *Atkinson v. Heer*, 44 Ark. 174; *Watson v. Brennan*, 7 Jones & S. 81; and nominal damages and costs have been allowed: *Smith v. Perry*, 18 Tex. 510; S. C., 70 Am. Dec. 295; but, on the other hand, that plaintiff is not entitled even to nominal damages, unless he has sustained actual injury by reason of such failure: *Stevenson v. Judy*, 49 Mo. 227. In such an action it has been held, too, that it is no defense that the deputy sheriff indorsed a return upon the execution, and went to the clerk's office to file it, but that the clerk was absent, and that he was afterwards prevented

by his official duties from returning to the clerk's office, without further showing that the office remained closed beyond the life of the execution, and that he returned it as soon afterwards as practicable: *Atkinson v. Heer*, 44 Ark. 174. And it is no defense to such an action, where the writ issued November 30, 1867, and was returnable in February next, that the sheriff failed to renew his bond in January, as required by law, but still continued to act as sheriff: *Dunphy v. Whipple*, 25 Mich. 10.

So where one became bail at the request of a third person, who afterwards paid him the greatest part of the judgment, which the bail had been compelled to satisfy, this was held to constitute no defense for the sheriff in an action brought against him by the bail for a false return on the execution: *Kidder v. Parlin*, 7 Greenl. 80. The statute sometimes provides a more expeditious remedy against sheriffs and other officers for failure to levy or return writs of execution, etc., and this is by amercement: *Crooker v. Melick*, 18 Neb. 227; S. C., 24 N. W. Rep. 689; *Hellman v. Spielman*, 19 Neb. 152; S. C., 27 N. W. Rep. 131; *Heymann v. Cunningham*, 51 Wis. 506; *Brener v. Elder*, 22 N. W. Rep. 622. The sheriff may be ordered, in such cases, to show cause: *Brener v. Elder*, 22 Id. 622; or be proceeded against as for a contempt: *Schwab v. Coots*, 44 Mich. 463; S. C., 7 N. W. Rep. 195. In all proceedings or actions against sheriffs or other officers for failure to return writs of execution and other process, the inquiry is permitted whether the debt could have been collected, and whether its collection has been prejudiced by the acts of the defendant; and in such cases the actual loss sustained by the plaintiff in the value or availability of his security, by reason of the act or negligence of the defendant, is the measure of his damages: *Crooker v. Melick*, 18 Neb. 227; S. C., 24 N. W. Rep. 689; *Hellman v. Spielman*, 19 Neb. 152; S. C., 27 N. W. Rep. 131; and all legal facts necessary and proper to prove or disprove such damages may be pleaded and proved: *Crooker v. Melick*, *supra*. On a motion to amerce a sheriff for neglecting to levy a writ of *feri facias*, the plaintiff is not required to show with precision the value of the property on which levy might have been made. It is enough if he show that the neglect has deprived him of a substantial benefit under his writ: *White v. Rockafellar*, 45 N. J. L. 299. Where the officer has actually made a service as directed by plaintiff's counsel, he is bound to make a return showing that fact: *Heymann v. Cunningham*, 51 Wis. 506. A notice of amercement for neglect in serving an execution must assign "neglect" or "refusal" to execute it as the ground of amercement. The alleged ground that it is "for not executing the writ of execution": *Stryker v. Merseles*, 24 N. J. L. 542; or, "that he hath not returned the execution according to law, and for neglect of duty in relation to said execution": *Ritter v. Merseles*, 4 Id. 627, — is insufficient for want of certainty. A sheriff will not be amerced if the plaintiff has by his own interference prevented him from discharging his duties: *Stryker v. Merseles*, 4 Id. 542; nor will he be amerced for the whole debt and costs for a mere failure to return a *feri facias*: *Waterman v. Merrill*, 33 N. J. L. 378; *Todd v. Hoagland*, 36 Id. 352; nor is he liable to amercement where he received a summons by mail to serve, six days before the sitting of the court at which it was returnable, but did not serve it until two days thereafter: *Yeargin v. Wood*, 84 N. C. 326. A sheriff may, after his term of office has expired, be amerced for official misconduct, whenever a proper case is made therefor. But a sheriff who receives a writ of execution about thirty days before his term of office expires, and does not serve the writ or return it to the court from which it was issued, nor deliver the same to his successor in office, cannot be amerced under the Kansas statute, unless it is affirmatively

shown, by special circumstances, that he was negligent in failing or refusing to commence to execute the writ before his term of office expired: *Armstrong v. Grant*, 7 Kan. 285.

9. *Other Matters.* — An officer having in his hands a writ for service has no authority, in his official capacity, to settle the demand, and to receive the money of the debtor: *Waite v. Delealernier*, 15 Mo. 144; *Green v. Lowell*, 3 Greenl. 373. If he fails to pay the money over, keeps it for a year, and the debtor is again sued, the officer may be sued for it and interest without previous demand: *Id.* If the sheriff, after the receipt of an execution, collects and pays to the plaintiff the amount due on the same, he is not liable to the plaintiff in the amount thus collected as a measure of damages, merely for a subsequent failure to return the writ: *Hoag v. Warden*, 37 Cal. 522; *contra*, *Green v. Lowell*, 3 Greenl. 341. It seems that in Tennessee, if the plaintiff receive from the sheriff money made by a levy of execution, it is a waiver of his action against the sheriff for a false return of the same execution; *aliter*, if the money be received on an *alias* execution: *Tripp v. McDonald*, 2 Humph. 386. An officer is bound to exercise ordinary and reasonable diligence in executing writs; and what constitutes such diligence, or what amounts to negligence, where there is any question about the facts, is a question of fact for the jury; and to assist them in the solution of this question, the jury must consider all the facts attending each particular case. The cases cited above show that "among the most material of the facts thus to be considered are the information which the officer actually possessed, the means by which this information would have been extended, the press of other official duties, and the various hindrances which, without his fault, may have impeded his progress." They also show that the issue most frequently to be tried in actions against officers for not levying process is this: "Did the defendant in execution have property, of which the officer by the exercise of reasonable diligence could have had knowledge, and upon which a seizure could have been made?" *Froeman on Executions*, sec. 252; note to *Hargrave v. Penrod*, 12 Am. Dec. 203; note to *McDonald v. Neilson*, 14 Id. 457; *Finnigan v. Jarvis*, 8 U. C. Q. B. 210; *State v. Porter*, 1 Harr. (Del.) 127; *Barnes v. Thompson*, 2 Swan, 313; *Snell v. State*, 2 Id. 243; *Taylor v. Wimer*, 30 Mo. 126. Due diligence or reasonable diligence in levying process or writs may depend upon the fact of defendant's fraud, or that he is about to leave the state, or to remove his property therefrom, etc.; hence immediate action is necessary: *Whitney v. Butterfield*, 13 Cal. 339; but the law requires no impossibilities, and imposes no unconscionable exactions: *Id.* Therefore a sheriff is not bound to keep sentinel day and night at a defendant's house for several days or weeks in succession to be duly diligent: *Finnigan v. Jarvis*, 8 U. C. Q. B. 210. Where the undisputed facts show negligence in the sheriff, by failing or neglecting to levy a writ or process in his hands, and no excuse is shown, it is error to submit the question of his negligence to the jury: *Elmore v. Hill*, 51 Wis. 365; S. C., 8 N. W. Rep. 472; 46 Wis. 618; 1 N. W. Rep. 235. Where negligence conclusively appears, there is no question for the jury: *Id.* But in an action against a sheriff for failure to arrest, when the proceedings in the case out of which the writ issued are valid on their face, and an offer is made to show complete jurisdiction in the court issuing the writ, it is error for the court to direct a verdict for the defendant: *Hatch v. Saunders*, 33 Id. 178.

With respect to the burden of proof in an action against an officer for an omission or neglect of duty in levying writs, it has been held that to render a sheriff liable for a failure to levy, it must appear that he had knowledge of

property subject to execution, or of facts which would have enabled him to ascertain such property: *Bell v. Commonwealth*, 1 J. J. Marsh. 550; *Taylor v. Wimer*, 30 Mo. 126. Such an action cannot be sustained by showing merely that the officer was directed to levy upon certain property. It must also be shown that defendant had at the time some interest in the property, or such possession as would raise a presumption of ownership: *Stevenson v. Judy*, 49 Id. 227; for possession of property is always *prima facie* evidence of ownership. So to render a sheriff responsible for not making money on an execution, it is necessary to prove that the execution had been placed in his hands, and that while in his hands, he had been required to make a levy when it was in his power to do so, and that he had failed to make such levy: *Iyendecker v. Martin*, 38 Tex. 287. So in an action against an officer for neglecting to attach property as the property of the plaintiff's debtor, it has been held that the burden of proving that the property was so far the debtor's as to be liable to attachment as his, is upon the plaintiff throughout, although the defendant claims title in himself under a purchase from the debtor: *Phelps v. Cutler*, 4 Gray, 137. On the other hand, however, in an action against a sheriff for failing to levy upon property, it has been held that the *onus* or burden is upon the officer to prove circumstances justifying his omission or neglect: *Elmore v. Hill*, 46 Wis. 618; S. C., 1 N. W. Rep. 235; *Bonnell v. Bowman*, 53 Ill. 460, citing the principal case to this point; as showing that a delay was not, in fact, unreasonable: *Id.*; or that the defendant in the writ was insolvent: *State v. Troutman*, 5 Jones, 379; S. C., 7 Id. 169. So, with proving a reasonable excuse for his failure to make a return: *Smith v. Perry*, 18 Tex. 510; S. C., 70 Am. Dec. 295. So in an action against a sheriff for damages on account of his failure and neglect to serve a writ of attachment, when the defense is set up that the property upon which he was directed to levy had been transferred to an assignee by assignment for the benefit of creditors, it is incumbent upon the defendant to show that a bond had been filed by the assignee within the time required by statute, or that creditors had intervened to enforce the assignment: *Beard v. Clippert*, 30 N. W. Rep. 323. And the cases are quite uniform, to the effect that where the execution defendant is shown to be in possession of property, it devolves upon the officer to show that such property is exempt from execution: *Bonnell v. Bowman*, 53 Ill. 460, citing the principal case to this point; *Terrell v. State*, 66 Ind. 570; *Governor v. Campbell*, 17 Ala. 566; *Abbott v. Gillespy*, 75 Ill. 180. Unless he does so, he will be liable in an action for failure to levy. In fact, it is the safer policy for him to levy upon exempt property, and let the creditor contest the claim of exemption under the provisions of the statute: *Abbott v. Gillespy*, *supra*; compare *State v. Bradford*, 44 Ga. 417. In a proceeding against a sheriff for failing to levy an execution which came to his hands in November, the tax rolls showing that the defendant in execution rendered no property for taxes on the first day of the preceding January, have been held inadmissible: *Batte v. Chandler*, 53 Tex. 613. But they have been admitted in Georgia as tending to show ownership of property, and value put thereon by the owner, particularly when connected with other evidence to the same effect: *Ivey v. Colquitt*, 63 Ga. 509.

COOPER v. TYLER.

[46 ILLINOIS, 462.]

BURDEN OF PROOF AS TO NEW MATTER. — If the answer to a bill in chancery, by way of affirmative allegations, sets up new matter, not responsive to the bill, the burden is upon the defendant to prove the allegations as charged.

SPECIFIC PERFORMANCE. — VENDOR IS BOUND TO CONVEY TITLE TO LAND WHICH HE SELLS AND COVENANTS FOR IN HIS OBLIGATION; and if from his negligence or default the title has been lost, or the property becomes encumbered by judgments, taxes, forfeiture, or otherwise, before the time for conveying the same, or before he offers to perform his contract, or before a rescission of the contract, he cannot insist upon performance by the other party until he relieves the title from such subsequent encumbrance.

JURISDICTION IN CHANCERY OF DEFENSE AT LAW. — Where the holder of a note executed with a power of attorney to confess judgment procures judgment thereon in a foreign county, without notice to the debtor, the latter will not be precluded from resorting to a court of chancery, although the ground of relief sought in chancery could have been made available in a suit at law, if the debtor had had notice of the pendency of the proceedings.

CONTRACT MAY BE TREATED AS RESCINDED WHEN — COLLECTION OF JUDGMENT MAY BE ENJOINED WHEN. — Where a vendor of lands executed to his vendee a bond for a deed, in which he agreed to execute a deed to his vendee in sixty days from the date thereof, without any conditions, and received the vendee's note for the remainder of the purchase-money, with a power of attorney to confess judgment, and at the expiration of sixty days offered to make a deed, if the vendee would execute a mortgage to secure the unpaid note, which the vendee refused to do, and the vendor, not having complied with the conditions of his bond, afterwards obtained judgment by confession on the note in a foreign county, without notice, and the vendee not having exercised any right of ownership over the land, nor by any subsequent act committed himself to a performance on his part, it was held that the vendee had a right to treat the contract as rescinded, and to enjoin the collection of the judgment. The vendee had a right to insist upon the contract as it was made; and the offer to make a deed imposing conditions would be the same as if no offer of a deed had ever been made.

APPEAL. The facts are stated in the opinion.

Skinner and Marsh, for the appellant.

Wheat and Marcy, for the appellee.

By Court, WALKER, J. This was a bill filed by Benjamin F. Cooper in the Adams circuit court, against Augustus Tyler, to enjoin the collection of a judgment, recovered by the latter against the former, by confession on a power of attorney, in the state of Wisconsin. It appears that on the 23d of December, 1856, appellee sold to appellant several tracts of land,

situated in Marathon County, in the state of Wisconsin. He at the time gave to appellant a bond for a warranty deed for the same, within sixty days from that date. Appellant executed his two promissory notes for the purchase-money, one for \$920 due on the 15th of March, 1857, in lumber; but it seems to be conceded that \$320 of this note was not for the purchase-money. This note was paid in lumber. The other was for \$2,000 payable on the 1st of September, 1859, with ten per cent interest.

Afterwards, appellee prepared and offered to deliver the deed, upon the condition that appellant would execute a mortgage on the land, to secure the purchase-money, but he declined receiving it on these terms, as no such condition was contained in the contract. Subsequently, in June, 1860, appellee, without any notice to appellant, caused a judgment to be entered by confession, under the power executed at the time of entering into the contract, on the two-thousand-dollar note, for about \$2,712, for principal and interest, in Lafayette County, in the state of Wisconsin. After the offer to deliver the deed by appellee, on the conditions which were refused, it seems that neither party gave any further attention to the lands, and they have been forfeited, or sold for taxes; nor does it appear that appellant exercised any ownership over them.

At the November term, 1866, of the Adams circuit court, appellee commenced suit, and sued out an attachment against appellant, on that judgment, and had garnishee process served on debtors of appellant, and this bill was exhibited to restrain its collection. The court, on a hearing on the bill, answer, replication, exhibits, and proofs, rendered a decree dissolving the injunction, and dismissing the bill. And the cause is brought to this court to review that decree.

It is insisted in the answer to the bill that it was a part of the agreement, that appellant was to execute a mortgage on the premises, when the deed should be delivered, to secure the purchase-money, and that it was by mistake omitted to be inserted in the bond. Of this there seems to be no evidence. The attorney who drew the writings states that he has no recollection of any such understanding, and appellant, in his testimony, positively denies that there was any such agreement. This being new matter, set up as an excuse for not executing the agreement, as it is embodied in the bond, and not being responsive to the bill, it devolved upon the appellee to prove the allegation. This he has failed to do.

He also sets up in his answer that appellant agreed to pay the taxes on the land, but has equally failed to prove that allegation. It being new matter, it should have been proved by him. And appellant states in his evidence that no such agreement was ever made. The rule is familiar that the vendor is bound to convey the title to the land which he sells, and covenants for, in his obligation. And if from his negligence or default the property becomes encumbered by judgments, taxes, forfeiture, or otherwise, before the time for conveying the same, or before he offers to perform his contract, he cannot insist upon performance by the other party until he relieves the title from the encumbrance. If, in this case, the title has been lost, or the property encumbered, before a performance, or an offer to perform, or before a rescission of the contract, then appellee had no right, either in law or equity, to enforce the contract against appellant.

Appellee bound himself to execute and deliver a deed, within sixty days, for the lands, without any conditions imposed upon appellant. He never has, so far as this record discloses, offered to deliver the deed without imposing terms not contained in the contract. He had no right to require the execution of a mortgage; and the offer to deliver, on those terms only, was outside of the contract, and appellant had a right to refuse to receive the deed on the terms required. He had a right to insist upon the contract as it was made, and when the appellee refused to execute it according to its terms, appellant was at liberty to treat the contract as rescinded. No other offer of a deed seems ever to have been made, and with the unauthorized terms which were imposed, it was the same as if an offer had never been made. And from all the evidence in the case, we are impelled to the conclusion that appellant abandoned the contract, and never did any act subsequently by which he became liable for its performance.

Having failed to perform his part of the contract, it was the duty of appellee to keep down the taxes, and preserve the title to the land. Had he done this, and offered to perform the contract on his part, before being notified of a rescission by appellee, he might, no doubt, have made a proper tender, even after the time limited had expired; but he has wholly failed, and equity will not now require appellant to receive an encumbered, if not a doubtful, title, after such a length of time, without any default on his part. So far as we can see,

-appellant did all he was required to do under the contract until appellee had performed his part of the agreement.

It is, however, insisted that the defense should have been interposed to the recovery of the judgment on the note, and cannot be interposed in equity. It is a sufficient reply to say that appellant had no notice of the intended confession of judgment. Nor do we see that he was guilty of any negligence in not knowing the fact, as the judgment was not taken in the court of either the county of the residence of appellant or of appellee, but in another and distant county. Appellant was only required to use ordinary diligence to make his defense at law. He was not bound to employ agents in every county in the state to see that the suit was commenced. Had he been served with notice, then he would have been bound by his default in not defending at law, unless he could have shown a satisfactory reason for failing to do so in such a proceeding. But to hold that because a judgment by confession has been obtained without notice, and where the facts all seem to show that notice was not desired or intended on a note having neither legal nor equitable merits, that the defendant is estopped to show that the claim is unjust, would be a perversion of the plainest dictates of justice and the principles of equity. To permit the enforcement of the judgment in the action at law would be inequitable and unjust. We think appellant has shown such a state of facts as entitles him to an injunction; and the decree of the court below must be reversed, and the cause remanded.

Decree reversed.

DEFECTIVE TITLE AS DEFENSE TO SUIT FOR PURCHASE-MONEY: See note to *Harrod v. Blackburn*, 94 Am. Dec. 49; *Gans v. Renshaw*, 44 Id. 152; *Miles v. Stevens*, 45 Id. 621; *Ruskle v. Johnson*, 83 Id. 191; note to *Lloyd v. Farrell*, 86 Id. 568.

SPECIFIC PERFORMANCE AGAINST VENDEE OF LAND WILL NOT BE DECREED where the vendor cannot give a free and clear title: See note to *Brown v. Haff*, 28 Am. Dec. 429; *Gans v. Renshaw*, 44 Id. 152; or where he has not performed or offered to perform whatever the contract has made a condition precedent on his part: See note to *Green v. Covillaud*, 70 Id. 739; *Garretson v. Vankoon*, 54 Id. 492; *Hoen v. Simmons*, 52 Id. 291; *Rogers v. Saunders*, 33 Id. 635. Facts showing an abandonment of a contract by the plaintiff furnish a decisive answer to his prayer for a specific performance thereof: *Patterson v. Marts*, 34 Id. 474; and a specific performance will not be decreed when there is strong, un rebutted, *prima facie* evidence of a mutual abandonment of the contract: *De Cordova v. Smith's Adm'x*, 58 Id. 136. While he who insists upon a performance must show performance on his own part, he who wishes to rescind the contract need only show non-performance, or an inability to

perform, by the other party: See note to *Runkle v. Johnson*, 83 Id. 193. The vendee's right to a good title is given by the law, and does not rest upon the agreement of the parties: See note to *Gans v. Renshaw*, 44 Id. 156. And an encumbrance discovered before the execution of the conveyance must be discharged by the vendor: *Lighty v. Shorb*, 24 Id. 334. See note to *Anderson v. Green*, 23 Id. 423-431, on specific performance of contracts by courts of equity.

VENDOR MAY TREAT CONTRACT AS RESCINDED WHERE VENDOR IS UNABLE TO PERFORM what he agreed to do: *Lide v. Thomas*, 4 Am. Dec. 581; but see notes to *Bryant v. Isburgh*, 74 Id. 658; *Johnson v. Evans*, 50 Id. 673. As to right of rescission for encumbrances on title, see note to *Hampton v. Specknagle*, 11 Id. 709.

EQUITY WILL ENTERTAIN JURISDICTION OVER DEFENSES AT LAW WHEN: *Emerson v. Udall*, 37 Am. Dec. 604; *Pearce v. Chastain*, 46 Id. 423; *Greenlee Gaines*, 48 Id. 49; *Casey v. Gregory*, 56 Id. 581; *Gold v. Bailey*, 92 Id. 190.

JUDGMENT WILL BE ENJOINED WHEN: *Pollack v. Gilbert*, 60 Am. Dec. 732; *Crandall v. Bacon*, 91 Id. 451, note 452; *Pearce v. Chastain*, 46 Id. 423; *Emerson v. Udall*, 37 Id. 604. As to enjoining judgments rendered without notice, see *Jones v. Commercial Bank*, 35 Id. 419; *Gregory v. Ford*, 73 Id. 639.

HUMPHREY v. BROWNING.

[46 ILLINOIS, 476.]

ATTORNEY AT LAW HAS NO LIEN FOR HIS COMPENSATION UPON REAL ESTATE RECOVERED BY HIM for his client in ejectment, or any other action, either at law or in equity.

ATTORNEY AT LAW IN SOME STATES HAS LIEN, FOR HIS TAXABLE COSTS ALLOWED BY STATUTE, UPON JUDGMENT recovered for his client, but he has no such lien for his fees.

LAW DOES NOT ENCOURAGE SECRET LIENS, SUCH AS ATTORNEYS' LIENS WOULD BE. — Neither a mechanic's lien nor the equitable lien of a vendor of land for the purchase price is favored in law.

APPEAL. This was a bill in chancery, filed in the court below by the appellees, against the appellants, to obtain a lien for their claim to compensation, upon certain real estate recovered in an action of ejectment, prosecuted by them as the attorneys of appellants.

Shaw and Crawford, for the appellants.

F. V. Marcy, Jackson Grimshaw, and N. Bushnell, for the appellees.

By Court, BREESE, C. J. The only important question presented by this record which we propose to examine is, Has an attorney at law a lien upon the real estate recovered in an action of ejectment, prosecuted by him?

This is a new question in this court, and if it rests upon a great preponderance of authority in its favor, as argued by appellees, it would seem to be no difficult matter to produce the authority. If it does exist in any country in the world, where the common law prevails, or equity jurisprudence obtains, the books ought to be full of such cases. Not a single case has been referred to by appellees sustaining their position. *Barnesley v. Powell*, 1 Amb. 102, is not a case in point. That was a petition by the solicitor of Barnesley, a lunatic, setting forth that he had expended great sums of money in prosecuting suits in the courts of chancery and at law against the defendant, Powell, on behalf of the lunatic, and praying that he might be at liberty to enter up a judgment with a stay of execution against the lunatic for such moneys, that thereby he might obtain a lien on the real estate of the lunatic.

This was refused by the chancellor, upon the ground that no action would lie against the lunatic, but it must be against the committee of the lunatic who employed the solicitor. The chancellor said the committee had a lien upon the lunatic's estate, and being willing, as he said, to assist the solicitor all he could, he would declare the solicitor to stand in the place of the committee, and had a lien upon the lunatic's estate. Immediately following this opinion of his lordship is this, "*Quære*: If he had such a lien. The counsel for the solicitor to whom it was decreed doubted of it." This shows the solicitor had no lien except by way of substitution, and fails to sustain the position assumed by appellees. The chancellor, it is true, in the first part of the opinion says: "If a solicitor prosecutes to a decree, he has a lien on the estate recovered in the hands of the person recovering for his bills." But this point was not before the chancellor for adjudication, and in the case at bar, the chancellor having held that the solicitor had no right of action against the lunatic, it is not easy to see how he could have a lien against the lunatic's estate.

The case of *Turwin v. Gibson*, 3 Atk. 720, was a question of preference which should be first paid, the bond debts of the deceased or the solicitor's fees; and the chancellor decided the solicitor's fees should be first paid, and that such was constantly the rule of that court; and it is quite likely that in that particular case the solicitor was entitled to a preference for his fees, but it does not touch the case appellees are endeavoring to make.

The case of *Worral v. Johnson*, 2 Jac. & W. 218, has not been examined, the book not being accessible.

The case of *Ex parte Price*, 2 Ves. Sr. 407, was also by Lord Hardwicke, and was a petition by a solicitor to be paid his bill of costs in taking out a commission of lunacy, out of the fund of the lunatic's estate, and not oblige him to come under the commission of bankruptcy against him who took out the commission of lunacy, and his lordship said solicitors have this equity allowed to them to be entitled to a satisfaction out of the fund for their expenses, whether it was in the way of suit or prosecution in lunacy or bankruptcy.

The case of *Mitchell v. Oldfield*, 4 Term Rep. 123, was a case where mutual judgments were sought to be set off, and the attorney of one party claimed a lien for his costs, and Lord Kenyon, C. J., said that this did not depend on the statute of set-off, but on the general jurisdiction of the court over the suitors in it; that it was an equitable part of their jurisdiction, and had been frequently exercised; but as to the other point, he observed that the attorneys and solicitors of the different courts have a lien on all papers in their hands, and judgments recovered for their costs; that in the court of chancery they were permitted to retain title deeds for that purpose, and he thought it right that the attorney in this case should be satisfied for his costs, before the defendant was allowed to make the set-off.

The case of *Read v. Dupper*, 6 Term Rep. 361, holds, if the defendant's attorney pay to the plaintiff the debt and costs recovered after notice from the plaintiff's attorney not to do so until his bill has been first satisfied, the former is liable to pay over again to the latter the amount of his lien on such debt, and costs of suit.

These are all mere adjudications that an attorney has a lien on the papers and judgment for his costs, and these costs are all matter of record, and may, with great propriety, be considered a lien on the fund or property recovered. This lien is confined to some fixed and certain amount, allowed to an attorney by statute or by rules of court, and has never, that we can find, been extended to cases where an attorney counselor claims a *quantum meruit* compensation for services rendered.

We have looked into all the cases cited by appellees, decided in this country, supposed to bear upon this case, and as supporting the claim they set up. *Hobson v. Watson*, 34 Me. 20

[56 Am. Dec. 632], was decided, as the very first sentence of the opinion of the court shows, upon chapter 117, section 37, of the statutes of that state, which expressly recognizes the existence of a lien upon the judgment in favor of the attorney in the suit for his fees and disbursements, by which we understand his taxable costs.

Shapley v. Burrows, 4 N. H. 347, decides, where parties have mutual executions against each other, either party is entitled, under the statute of the state, to have one execution set off against the other, but not to the disparagement of the attorney who has a lien on the judgment to the extent of his fees and disbursements. The court argues at length the justice of such a lien, and closes by saying the lien does not extend beyond the amount of the fees and disbursements, by which we understand fees and disbursements legally chargeable and taxable against the party. The twenty-first volume of New Hampshire reports, from which is cited the case of *Wright v. Cobleigh*, 21 N. H. 339, is not at hand.

Wells v. Hatch, 43 N. H. 247, decides that the lien of an attorney extends only to the taxable fees and disbursements in the cause, and does not include counsel fees, nor incidental expenses, commissions, or any claims against his employer not taxable. Reference is made to *Shapley v. Burrows* and *Wright v. Cobleigh*, *supra*.

Andrews v. Morse, 12 Conn. 444 [31 Am. Dec. 752], decides that an attorney, having obtained a judgment, has a lien upon the judgment and execution as against the debtor, with notice, for his services and disbursements in the progress of the suit, which courts of law and equity will protect, subject to the equitable rights of others.

Gager v. Watson, 11 Conn. 168, decides that an attorney, as against his client, has a lien upon all papers in his possession, for his fees and services performed in his professional capacity, as well as upon judgments recovered by him. But his lien upon judgments is subject to the equitable claims of the parties in the cause, as well as to the rights of third persons, which cannot be varied or affected by such lien.

Rumrill v. Huntington, 5 Day, 165, decides that an attorney has no lien upon a judgment, obtained in favor of his client, which can vary or affect the rights of a stranger. No such lien is created, either at common law or by the principles of chancery.

Martin v. Hawks, 15 Johns. 405, decides only that an attorney

ney has a lien on a judgment recovered by him for his client for his taxable costs, and if a defendant, after notice of such lien, pay the amount of the judgment to the plaintiff, without satisfying the attorney for his costs, such payment would be in his own wrong, and he would be liable to the attorney for the amount of his bill. The cases of *Ward v. Wordsworth*, 1 E. D. Smith, 598, and *Bradt v. Coon*, 4 Cow. 416, both relate to the taxable costs for which a lien exists.

Rust v. Larue, 4 Litt. 417 [14 Am. Dec. 172], does not, as we read it, touch this case. The question of champerty was the only question involved, and the same is the case of *Caldwell v. Shepherd*, 6 T. B. Mon. 392.

Read v. Bostick, 6 Humph. 321, decides only that an attorney who received the proceeds of land sold by a decree in chancery, which he obtained for the payment of debts, may, after the payment of the debts, retain so much as might be due him for his professional services rendered in the cause.

Pope v. Armstrong, 3 Smedes & M. 284, and *Cage v. Williams*, 3 Id. 223, decides only that an attorney has a lien on money collected for a client for the satisfaction of his claim for professional services.

McDonald v. Napier, 14 Ga. 89, is more to the point than any other case before cited, but does not reach the precise point of this case.

It is there held that in Georgia attorneys and solicitors have the same liens for their fees, whether agreed upon by express contract, or by implied contract, or determinable by the usages of the profession which exist in England in favor of attorneys and solicitors for their bills of costs.

Carter v. Davis, 8 Fla. 183, decides nothing more on the point in question than that the claims of attorneys in certain cases constitute an equitable lien on the judgment recovered by them, and as such, entitled to priority. The extent of the lien, however, was to be ascertained upon the basis of *quantum meruit*.

Carter v. Bennett, 6 Fla. 214, is a branch of the above case in 8 Florida, and it holds that professional services of an attorney in that state constitute what is known and spoken of in this country and in England as "fees" and "costs," between attorney and client, and constitute a lien which should be enforced under the same rules of law as in England, where these fees and costs are taxable, so far as consistent with the practice in Florida.

Fowler v. Morrill, 8 Tex. 153, goes to the point only that an attorney's lien on a judgment recovered by him will be protected.

We have thus reviewed all the cases cited by appellee, and we are confident not one of them sustains them in the position they have taken, and ask this court to sustain that their claim to compensation as attorneys at law is a lien upon the land, recovered in an action of ejectment.

On the other side, several cases are cited, decided by courts in states where the practice of taxing costs by an attorney does not prevail.

In Indiana it was held, *Hill v. Brinkley*, 10 Ind. 102, that attorneys have no general lien upon judgments for fees. In England, and in some of the states of the Union, attorneys have such a lien for taxable costs; but these are different from attorneys' fees. These taxable costs in Indiana, and in this state, go to the clerk and other officers, not to attorneys. Neither statute nor usage in that state gives attorneys a lien upon judgments for their costs.

In *Smalley v. Clark*, 22 Vt. 598, this whole subject is fully examined, and the conclusion reached that a solicitor in chancery, who was employed to commence and prosecute a suit for the purpose of obtaining for his client an unembarrassed title to land to which he had a claim, and who successfully prosecuted the suit to a final decree whereby the client obtained the land, had no specific lien upon the land so obtained for the payment of his account for services and expenditures in the prosecution of the suit.

This is a case quite in point, the only difference being that appellees' services, for which they claim a lien on the land recovered, were rendered in a court of law, while those were in a court of chancery.

The facts in that case were not dissimilar from the facts in the case before us, as would appear from the structure of the bill. Smalley's bill was predicated upon the idea that he had what was called an attorney's lien upon the lands for the payment of his account for professional services in securing the land. The question was, in that case, Had the complainant Smalley any specific lien upon this land, as against Smith, which a court of equity could protect and enforce? The court, admitting that attorneys have a lien upon judgments recovered for their clients for their costs, and may retain the amount in their hands, and may have an order to restrain

their clients from receiving the proceeds until their bills have been paid, yet hold that a lien upon the land recovered is not recognized by an adjudged case in England, save in the doubtful case of *Barnesley v. Powell*, 1 Amb. 102, cited by appeal as a leading case on the point, and which we have endeavored to shew has but little, if any, application.

The court say if such a lien as contended for existed in England, it is somewhat remarkable that numerous adjudged cases are not to be found in which it has been recognized and enforced. That court was not aware of any such case, and none was cited on the argument. The absence of such cases, especially as there would have been frequent occasion for enforcing such a lien if it existed, furnishes a strong argument that no such lien does exist.

Hanger v. Fowler, 20 Ark. 667, was a case where Fowler, an attorney at law and solicitor in chancery, had been employed to prosecute a suit in chancery for the recovery of a tract of land in which the attorney was successful. He claimed a lien on the land recovered, and his counsel urged all the arguments and cited most of the authorities cited in this case. The court said, to hold that a solicitor has a lien upon the lands recovered in a chancery suit for his reasonable fee would be introductory of a new principle, and an extension of the doctrine of the solicitors' lien beyond adjudged cases. The leading case of *Barnesley v. Powell*, 1 Amb. 102, was fully examined and commented on, and also the case of *Turwin v. Gibson*, 3 Atk. 720, and were considered as failing to sustain the claim set up.

Frizzell v. Haile, 18 Mo. 18, decides that attorneys in that state have no lien for their fees upon judgments recovered by them, and a defendant would be protected in paying the money to the plaintiff in the judgment, notwithstanding he may have notice that the fees of the attorneys are unpaid. The court said that attorneys and counselors at law in Missouri were not to be confounded with the mere attorneys and solicitors in England. There they are recognized as officers of the court, and entitled to fees for the services performed by them in the same manner as the clerks of our courts of record. Their fees are ascertained and fixed by rules of court, and are recognized in the taxation of the costs of the suit; and such being their foundation, the law confers a lien on papers and on judgments to secure their payment, and will not suffer conclusive compromises between the parties to

a suit made with a view to prevent their recovery. In our country, attorneys at law are allowed no pay which is taxed as costs. They look to contracts made with clients for remuneration for their services. If they receive the money of those who employ them, they may retain their pay just as any other bailee may retain for services rendered in the case of the subject of the bailment. Hence the court say, the learning in the English books, in relation to the liens of attorneys, has but little, if any, application under our system of laws.

In *Dubois's Appeal*, 38 Pa. St. 231 [80 Am. Dec. 478], the court said, in a certain sense an attorney may be said to have a lien for his fees upon the money or papers of his client, while they are in his hands. He may deduct from money collected by him a just compensation for collecting it, and need only pay over the balance. This, however, is a right to defalcate, rather than a lien. So he may retain papers intrusted to him, until he has been paid for services rendered in regard to them; but possession is indispensable to his lien, as much as it is to the lien of an ordinary factor or bailee.

In *Cozzens v. Whitney*, 2 R. I. 79, which was a proceeding in chancery seeking to obtain a lien upon real estate, toward which complainant had rendered professional services as an attorney, on the assurance that they would be paid for by means of the estate, the court said they could not see how, upon the general principles of equity, there could be a lien on the property for the payment of complainant's claim.

In *Ex parte Kyle*, 1 Cal. 331, it was said an attorney has a lien for his costs upon a judgment recovered by him, but these are such costs as are allowed to an attorney by statute, and is not extended to cases where an attorney or counselor claims a *quantum meruit* compensation for his services.

A careful review of the authorities cited satisfies us that no such lien as claimed by appellee has ever been allowed in any court in England, or in any of the states of this Union. No case directly on the point has been cited; for while, as in England, New York, Massachusetts, Georgia, and Florida, attorneys have a lien on the judgments recovered for their costs, nearly all the cases show the judgments were money judgments, and the lien allowed was for taxable costs only, and not where a *quantum meruit* compensation was claimed.

In this state we have no statute giving costs to attorneys; consequently they must recover for their services in the ordinary mode.

The argument of appellees, as to the justice of the claim to a lien, might with propriety and force be addressed to the law-making power.

It may be, a lawyer's services in recovering a tract of land by suit are as meritorious as those of a carpenter or mason who builds a house, but the latter had no lien until it was given to them by an express statute. At common law, liens of particular persons, in certain cases, were recognized and enforced, but they were of a kind that attached to an article in the actual possession of the bailee.

If he parted with the possession, the lien in general was lost. We are not able to find any case where it has been directly decided that an attorney at law is entitled to a lien on the land he may have been instrumental in recovering by action at law or in chancery.

Such a lien would be a secret lien; which the policy of the law does not encourage, and when claimed, it must be supported by unquestionable authority.

A mechanic's lien, though created by express statute, is not favored by courts, for the reason that it is a secret lien, of which the public can have no notice. So with the equitable lien of a vendor of land for the purchase price; this is not favored for the same reason, and it must be enforced in a reasonable time.

If to these secret liens be added those of an attorney, no one can foresee the difficulties and confusion that would result from it. Every tract of land which had once been a subject of litigation would lose most of its exchangeable value, from an apprehension of some latent lien in favor of some attorney.

We can see no reason for such a claim as is advanced by the appellees, and find no authority to support it.

The views above presented render it unnecessary to examine any other question made on the record.

The original decree not having been a final decree, and only made such by this last decree from which the appeal is taken, the reversal of the last must operate as a reversal of the first, and disposes of all the questions made on the record.

The decree is reversed.

ATTORNEY'S LIEN, ITS NATURE AND SCOPE: See *Warfield v. Campbell*, 82 Am. Dec. 724, note 729; *Newbert v. Cunningham*, 79 Id. 612; *Hobson v. Watson*, 56 Id. 632, note 635; note to *People v. Common Pleas*, 28 Id. 500; extended note to *Andrews v. Morse*, 31 Id. 755-760, on attorneys' liens for compensation and costs, citing the principal case at pages 755, 757.

SECRET LIENS ARE NOT FAVORED IN LAW: *McCoy v. Morrow*, 68 Am. Dec. 578; note to *Kanfield v. Bower*, 10 Id. 444.

THE PRINCIPAL CASE WAS CITED IN *Foraythe v. Beveridge*, 52 Ill. 268, to the point that an attorney at law has no lien upon a judgment for his fees; and in *La Framboise v. Gross*, 56 Id. 201, that he has no lien on the subject-matter of suit for his fees, and cannot prevent his client from transferring the same *pendente lite*. No Illinois statute gives costs to attorneys. In that state the attorney's fees rest entirely on the contract between the attorney and client, and he must recover for his services in the ordinary mode, by some appropriate action for that purpose: *Id.*

MURCH v. WRIGHT.

[46 ILLINOIS, 457.]

REAL CHARACTER OF TRANSACTION IS NOT AFFECTED BY NAME GIVEN TO IT. Thus a conditional sale is such, though it be called a lease.

CONDITIONAL SALE WITH RIGHT OF RESCISSION — TRANSACTION NOT LEASE THOUGH CALLED SUCH — VENDOR'S LIEN UNAVAILING AGAINST CREDITOR WHEN. — Under a written agreement, a piano worth seven hundred dollars was delivered to a purchaser, who, on taking it, paid fifty dollars, which was called the rent of the piano for the first month, and he was to pay fifty dollars at the beginning of each month thereafter for thirteen months; the piano to become the property of the purchaser in the event of his paying seven hundred dollars within the thirteen months, all past payments of rent to count as a part of the seven hundred dollars: *held*, that this transaction, though called a lease, was not such, but a conditional sale of the piano, with a right of rescission on the part of the vendor in the event that the purchaser should fail in paying the installments; and that if, while in the purchaser's possession, it was levied upon by his creditors, the vendor's lien would have to yield.

REPLEVIN for a piano-forte. Judgment for defendant, awarding a return of the property. The facts are stated in the opinion.

C. M. Morrison, for the appellant

John R. Eden, for the appellee.

By Court, LAWRENCE, J. We entertain no doubt that this transaction was, in fact, a sale of the piano, though made to assume the form of a lease for the purpose of giving the vendor a lien on the instrument until payment in full of the purchase-money. The mere statement of the facts shows this. The price of the piano was seven hundred dollars. The purchaser, on taking it, paid fifty dollars, which was called the rent of the piano for the first month; and he was to pay fifty dollars at the beginning of each month thereafter for thirteen

months, the piano to become the property of the purchaser in the event of his paying seven hundred dollars within the thirteen months; and in that event, all past payments of rent to count as a part of the seven hundred dollars. It will be observed that at the beginning of the thirteenth month, the purchaser would have paid \$650, and that he had the whole of that month for the payment of another \$50, on the payment of which sum, the piano was to become his property. It was a mere subterfuge to call this transaction a lease; and the application of that term in the written agreement between the parties does not change its real character. It was a conditional sale, with a right of rescission on the part of the vendor in case the purchaser should fail in payment of his installments, — a contract legal and valid as between the parties, but made with the risk, on the part of the vendor, of losing his lien, in case the property should be levied upon by creditors of the purchaser while in possession of the latter. That has happened in this instance, and the lien relied upon by the appellant is unavailing as against a creditor: *Jennings v. Gray*, 13 Ill. 610; *Brundage v. Camp*, 21 Id. 830; *McCormick v. Hadden*, 37 Id. 370.

As the case was tried by the court, and as that part of the evidence as to which there is no controversy fully sustains the finding, it is not necessary to decide upon the admissibility of the residue. Even if properly admitted, its exclusion would not have changed the result.

Judgment affirmed.

CONTRACTS OF SALE OR "LEASE" PROVIDING FOR PAYMENTS BY INSTALLMENTS: See extended note to *Miller v. Steen*, 89 Am. Dec. 127-129, citing the principal case.

THE PRINCIPAL CASE WAS CITED IN *Van Dusen v. Allen*, 90 Ill. 502, to the point that if the vendor of personal property, after the terms of sale are agreed upon, acquiesces in the possession of the vendee before he has complied with the terms and conditions of the sale, the title will pass in favor of a *bona fide* purchaser or creditor of the vendee, although the vendee may have taken possession at first without the vendor's consent. The principal case, however, was severely criticised in *Sanders v. Keber*, 28 Ohio St. 636, 638, 641, where it was held that, on a sale with delivery of chattels, to be paid for in future installments, the ownership and title of the property to remain in the vendor until payment, payment is a condition precedent, and until performance, the property is not vested in the vendee. The principal case was there said "to stand almost alone," to be against the well-settled doctrines of the common law, and to be unsupported by the whole current of well-considered cases. It was said, also, that in the principal case it was assumed that the contract was a subterfuge to evade the registry law, and

that the court thus set aside the real intention of the parties, and made for them, by construction, a new and different contract. In answer to the objection that executory contracts were against public policy, and calculated to defeat the objects intended by the chattel mortgage statute, the court said that that was an argument more properly addressed to the legislature than to the court, "especially after such contracts have been regarded as valid at common law from its earliest history." That no lien is effectual unless it is accompanied by possession, and that the moment possession is voluntarily surrendered the lien is gone, see *Oakes v. Moore*, 41 Am. Dec. 379; *Müller v. Marston*, 56 Id. 694.

CLARK v. THOMPSON.

[47 ILLINOIS, 25.]

MODE PROVIDED BY STATUTE MUST BE PURSUED, WHEREBY COURT ACQUIRES JURISDICTION over the persons of the minor heirs, in proceedings by an administrator to sell the real estate of his intestate; otherwise the court is without jurisdiction of the persons of such heirs, and, as against them, the proceedings are void. A guardian has no power, in such case, to admit service of the summons for the minor heirs.

PRESUMPTION IN FAVOR OF JURISDICTION OVER PERSON, even of a court of general jurisdiction, may be rebutted in all collateral proceedings. And such presumption is rebutted when the record shows service which is insufficient, and there is no finding of the court from which it may be inferred that there was other service or appearance.

WHERE COURT DOES NOT ACQUIRE JURISDICTION OF PERSONS OF MINOR HEIRS IN MODE PROVIDED BY STATUTE, in a proceeding to sell the real estate of a decedent by his administrator, such jurisdiction is not conferred by the appointment of a guardian *ad litem*, and his answer for the heirs; and, as to them, a decree in such case is a nullity, and may be attacked in a collateral proceeding.

ESTATE BY CURTESY, PRIOR TO ILLINOIS MARRIED WOMAN'S ACT OF 1861, CONFERRED a present existing right, giving the owner authority to use and enjoy it until it became extinct.

RECOVERY IN EJECTMENT MUST BE ACCORDING TO CLAIM made in the declaration. The plaintiff cannot recover a different estate from that claimed, nor can he recover an undivided interest when he counts for the whole.

EJECTMENT. The facts appear in the opinion.

Thomas G. Allen, for the appellant.

W. H. Barnum, for the appellee.

By Court, WALKER, J. This was an action of ejectment, brought by Sarah Jane Clark against Miles Thompson, in the Randolph circuit court. On the trial in the court below, the jury found a verdict in favor of defendant, upon which a judgment was rendered in his favor. To reverse that judgment,

an appeal is prosecuted to this court, and various errors have been assigned on the record.

It is first insisted that the circuit court rendering the order licensing the administrator to sell the land in controversy, to pay the debts of Cuthbert S. Crane, deceased, did not have jurisdiction of the persons of the heirs. It appears that a summons issued on the twenty-third day of April, 1849, to the widow and heirs, requiring them to appear on the fourth Monday of the same month to answer the petition; on the same day, McConnell and wife acknowledged service, and he also acknowledged service for the minor heirs of Crane, as their guardian. The record discloses no other notice or service, nor does the decree find that a different service was had. A guardian *ad litem* was appointed, and answered on the next day after the summons was issued, stating that he knows of no reason why enough of the land should not be sold to pay the debts. The decree finds that as the defendants urge nothing against the sale, and as the guardian *ad litem* admitted debts existed, the lands should be sold for their payment.

The statute has provided but two modes by which the court can acquire jurisdiction of the persons of heirs in this proceeding. One is by the publication of a notice for the prescribed period, and the other by serving a notice with a copy of the petition and account of administration upon the heirs thirty days before filing the petition. In this case, neither of these modes appears to have been adopted. In *Herdman v. Short*, 18 Ill. 59, and *Johnson v. Johnson*, 30 Id. 215, it was held that a summons with service was insufficient to confer jurisdiction in this proceeding. In this case, as to the minors, there is no pretense of service, nor had the guardian power to admit service for them.

It is, however, insisted that when a court of general jurisdiction has proceeded to adjudicate a cause, we must presume that the court had evidence that there was such service or appearance as confers jurisdiction of the person; that the question of jurisdiction is primary, and must first be determined. This is no doubt true in all collateral proceedings, but is liable to be rebutted. If the record shows service which is insufficient, and the record fails to show that the court found that it had jurisdiction, then the presumption is rebutted, and it must be held that the court acted upon the insufficient service. When a summons and return appear in the record, and there is no finding of the court from which it may be inferred that

there was other service or appearance, it will be presumed that the court acted upon the service which appears in the record. In this case, the summons and acknowledgment of service were not sufficient to confer jurisdiction over the minor defendants, and unless jurisdiction was otherwise obtained, the decree as to them was a nullity, and may be attacked in a collateral proceeding.

It is insisted that by the appointment of a guardian *ad litem*, and his answer, the minors were before the court, and there was no want of jurisdiction. It is urged that inasmuch as the forty-seventh section of the chapter entitled "Chancery" provides that the court may appoint a guardian *ad litem* for minor defendants, whether they have been served or not, the appointment of a guardian *ad litem* in this case gave the court jurisdiction, although the minors were not brought into court in the usual mode. Whatever might be the effect of such an appointment in a chancery proceeding, we need not now inquire, as this proceeding is not strictly of that character: *Moline Water Power etc. Co. v. Webster*, 26 Ill. 233. This is a statutory proceeding, and must be governed by the act, and not the rules of chancery practice.

Section 107 of the statute of wills only requires the appointment of a guardian *ad litem* when any defendant to a petition is a minor. It refers to all cases, and evidently proceeds upon the presumption that in all cases there will be service or publication, as required by section 103. The want of service was not cured by the answer of the guardian *ad litem*, and the minor heirs were not bound by the decree.

It however appears that the land in controversy descended to three children of Crane on his death. Two of these afterwards died intestate, leaving appellant and their mother their heirs. The mother subsequently intermarried with Moses McConnell, and they had children born of the marriage who are still living. They afterward conveyed the premises to Abraham Clare, under whom appellee claims possession. By the inheritance of Mrs. McConnell from her two deceased children of an undivided interest in the premises, her husband became entitled to curtesy in her fee in the property after the birth of their children. And when McConnell and wife sold to Clare, his curtesy in his wife's undivided interest in the property passed to Clare, and there is nothing to show that he had parted with that interest, or that it has been acquired by appellant. He was therefore entitled to hold possession to the

extent of the curtesy purchased of McConnell, if he held no other interest. An estate by the curtesy was, prior to the act of 1861, known as the married woman's law, conferred a present existing right, giving the owner the unquestioned authority to use and enjoy it until it became extinct.

The agreed facts in the case state that Mrs. McConnell had quitclaimed her interest in the premises to appellee before this suit was brought. It does not appear whether she did so before or after she joined with her husband in the conveyance to Clare, or whether her husband united with her in the conveyance to the appellant. If after the sale to Clare, or even before that time, her husband did not join in the deed, appellant took no title by the conveyance, as she was not able to convey alone during coverture. In either event, Clare acquired the interest of McConnell, held by the curtesy. If, however, McConnell joined his wife in the conveyance to appellant before he sold to Clare, and the latter had notice of the former sale, then Clare acquired no interest in the premises. But the record fails to present the date of this conveyance, and we cannot presume, in the absence of evidence, that McConnell joined with his wife in the quitclaim deed, and we must therefore hold that appellee was entitled to hold possession to the extent of his landlord's title by the curtesy.

In this case, the declaration proceeds for the recovery of the whole interest in the premises. And it has been repeatedly held that the recovery in ejectment must be according to the claim in the declaration; that when a plaintiff counts for the whole, he cannot recover an undivided interest, and if he proceeds for the recovery of one estate, he cannot recover a different estate: *Ballance v. Rankin*, 12 Ill. 420 [54 Am. Dec. 412]; *Rupert v. Mark*, 15 Id. 541; *Murphy v. Orr*, 32 Id. 489; *Lyon v. Kain*, 36 Id. 370. It does not appear that appellee is entitled to recover the entire premises, and inasmuch as there was no count in this declaration for the undivided interest which appellant may be entitled to recover, under a properly drawn declaration, he would not have been entitled to recover that interest. The judgment of the court below must be affirmed.

Judgment affirmed.

JURISDICTION DEFINED: *Callen v. Ellison*, 82 Am. Dec. 448; *Withers v. Paterson*, 96 Id. 643.

EVERY PRESUMPTION IS MADE IN FAVOR OF JURISDICTION of superior courts: *Butcher v. Bank of Brownville*, 83 Am. Dec. 446, and note 450; *Cooper*

v. *Sunderland*, 66 Id. 52, and note 70; *Potter v. Merchants' Bank*, 86 Id. 273.

JURISDICTION OF PERSON IS ACQUIRED by personal notice or service of process, and by other modes substituted by express provisions of law or the practice of courts: *Calles v. Ellison*, 82 Am. Dec. 448; *Gilman v. Thompson*, 34 Id. 714.

PRESUMPTION OF JURISDICTION MAY BE REBUTTED: *Bineker v. Dawson*, 39 Am. Dec. 430, and note 436.

JURISDICTION OF PARTIES TO PROCEEDINGS FOR SALE OF ESTATE OF DECEASED, HOW ACQUIRED: *Gibson v. Roll*, 81 Am. Dec. 219.

APPOINTMENT OF GUARDIAN TO APPEAR FOR AND REPRESENT INFANT HEIRS on application to sell real estate, necessity of: *Townsend v. Tallant*, 91 Am. Dec. 617, and note 623.

TENANCY BY CURTESY, when it may exist: *Malone v. McLaurin*, 90 Am. Dec. 320, and cases collected in note 322; *Johanson v. Cummins*, 84 Id. 142.

JUDGMENT IN EJECTMENT, CONCLUSIVENESS OF: *Covert v. Schmidt*, 85 Am. Dec. 187, and extended note 206.

PLAINTIFF IN EJECTMENT IS ENTITLED TO RECOVER if he shows a paramount title to any part of the premises described in his petition: *Bens v. Hines*, 89 Am. Dec. 594; but he cannot recover nor be put in possession of premises not described in the petition, judgment, nor execution: *Bullion Min. Co. v. Crasus etc. Min. Co.*, 90 Id. 526.

THE PRINCIPAL CASE IS CITED as follows, and to the points stated: When the question comes up collaterally, every presumption is to be made in favor of the jurisdiction of a court of general jurisdiction: *Faas v. O'Conner*, 6 Ill. App. 597; but the presumption may be rebutted: *Svearengen v. Gulick*, 67 Ill. 212; *Haywood v. Collins*, 60 Id. 334, 335; and where the same record shows insufficient service to confer jurisdiction of the person, and fails to show that the court otherwise acquired jurisdiction, then the presumption is rebutted: *Botsford v. O'Conner*, 57 Id. 78; the presumption in such case will be that the court acted upon the summons and return which do appear in the record: *Haywood v. Collins*, 60 Id. 334. In a proceeding by an administrator to sell the real estate of his intestate, unless the mode pointed out by the statute for bringing the parties interested before the court is pursued, there will be such a want of jurisdiction as will vitiate the order of sale: *Fell v. Young*, 63 Id. 103; *Haywood v. Collins*, 60 Id. 337; the admission of the guardian *ad litem* that notice was given could not bind the minor heirs: *Donlin v. Hettinger*, 57 Id. 352; nor has an attorney authority to enter their appearance: *Bonnell v. Holt*, 89 Id. 77. Where a court of superior jurisdiction exercises statutory and extraordinary powers, it stands on the ground and is governed by the same rules as courts of limited jurisdiction, which is, that nothing shall be intended to be within the jurisdiction but that which is so expressly alleged: *Haywood v. Collins*, 60 Id. 335. It is also cited as recognizing the existence of the estate of a tenancy by curtesy, since the married woman's act of 1861, in *Armstrong v. Wilson*, 60 Id. 228; and is distinguished in *Botsford v. O'Conner*, 57 Id. 84, in that there was no finding of the court in the principal case from which it could be inferred that there was service, and therefore it was held that the court must have acted on the defective service.

POWER OF GUARDIANS AND OTHERS TO WAIVE SERVICE OF JURISDICTIONAL PROCESS ON MINORS. — Statutes and rules of practice very generally

require infant defendants to be served with jurisdictional process the same as adults: *Hawes on Jurisdiction*, sec. 231; *Hickenbotham v. Blackledge*, 54 Ill. 316; *Hough v. Doyle*, 8 Blackf. 300; *Hough v. Canby*, 8 Id. 301; *Peoples v. Stanley*, 6 Ind. 410; *Ingersoll v. Ingersoll*, 54 Tex. 155; *Helms v. Chadbourne*, 45 Wis. 60; *Lessee of Nelson v. Moon*, 3 McLean, 319; and see note to *Joyce v. McCahey*, 89 Am. Dec. 186. It follows, therefore, that a guardian has no power to waive such process, or enter an appearance for his ward: *Hawes on Jurisdiction*, sec. 231; *Fitnam on Summons*, sec. 70; *Greenman v. Harvey*, 53 Ill. 386; *Robbins v. Robbins*, 2 Ind. 74; *Ingersoll v. Mangum*, 84 N. Y. 622; *Fitch v. Cornell*, 1 Saw. 156; nor has an attorney authority to enter an appearance for minors: *Bonnell v. Holt*, 89 Ill. 71; and see *Valentine v. Cooley*, Meigs, 613; 8. O., 33 Am. Dec. 166.

NICCOLLS v. RUGG.

[47 ILLINOIS, 47.]

PROPERTY OF RELIGIOUS CORPORATION, IN CASE OF SEPARATION, both parties still adhering to the tenets and discipline of the organization, should be divided between them in proportion to their numbers at the time of such separation.

RIGHT OF VOTING UPON QUESTIONS AFFECTING PROPERTY OF RELIGIOUS CORPORATION should not be confined to church members, but should also extend to those who have contributed to the support of the church, although not members.

PROPER MODE IN MAKING PARTITION OF PROPERTY OF RELIGIOUS CORPORATION, in case of a division, is to count church members by virtue of their membership, and, in addition, to count as members of the congregation all pew-holders.

BILL in equity. The opinion states the case.

R. E. Williams, and Spencer and Ewing, for the appellants.

Tipton and Benjamin, and W. H. Hanna, for the appellees.

By Court, LAWRENCE, J. This was a bill in chancery, filed in behalf of the minority of a religious society in the city of Bloomington, against the trustees elected by the majority, to prevent an alleged misappropriation of the church property. The record shows that the church in question was organized in 1833, as a Presbyterian body, the division of that denomination into old school and new school not having then occurred. This separation took place in 1838, and the Bloomington society, during the same year, attached itself to the new-school organization. It so continued until 1848, when, with the consent of the presbytery, of which it formed a part, it withdrew, and attached itself to the old-school denomination. It thus remained until 1865, when a large majority of the church and

congregation voted to sever their connection with the old-school organization and return to the new school, and this was done. The discontented minority, which preferred the old-school, elected new trustees, who have filed this bill against the party in possession, claiming that the church property rightfully belongs to them. The circuit court, when the case came on for a hearing, ascertained through its master the exact number of church members, and pew-holders not church members, comprised in the society at the time of its final action for withdrawal from the old school in June, 1865; and further ascertained how many of these persons belonged to each party, and decreed a sale of the property, with the privilege of purchase to either the complainants or defendants, and to them only; the decree further providing that the party purchasing should retain exclusive possession of the property, and pay to the other party its proportionate share in money, which share was found to be 63 parts out of 192 to the complainants, or old-school party, and 129 parts out of 192 to the defendants, or new-school party. The decree further required the party receiving the money to invest it in other church property, and report to the court the manner of its investment. The complainants appealed, and both parties have assigned errors.

It is first urged by counsel for appellants that the withdrawal of a portion of the church, although a majority, from the old-school denomination, was an abandonment of its rights of property, on the ground that a majority of a religious society have no right to abandon its tenets and doctrines, and still insist on the control of its property which has been dedicated to the support of its peculiar faith. Conceding this to be correct as the statement of a general principle, it clearly has no application to the present case. It is shown by the record that there has been here no abandonment of the faith or doctrines which this church was originally founded to support. It is shown that the old-school and new-school branches of the Presbyterian Church adopt the same standards, both as to doctrines and forms of government, and the separation in the denomination arose from a cause which has long since ceased, and, in the language of one of the clerical witnesses, the difference continues "simply because they are separated." When, therefore, a majority of the Bloomington Church resolved to bring that body into denominational connection with the new-school Presbyterians,

it was not perverting the church property to the teaching of new doctrines, but merely connecting itself for the purposes of co-operation and church government with another branch of substantially the same church.

But besides all this, the lot upon which the church edifice stands was donated to that body while attached to the new-school presbytery, and the building was commenced and well-nigh completed before the church, in 1848, attached itself to the old-school organization. In the face of this fact, it is difficult to see on what ground a court could hold that the majority of the church, by returning to their original church connections, have forfeited all rights of property in favor of those members of the society who prefer their existing ecclesiastical relations, or how the appellants can claim more than the distributive share of the property which the court has awarded to them.

It is also urged that the constitution of the Presbyterian Church does not recognize the right of a church or congregation to withdraw; and on this point the evidence of clergymen taken in the case of *Ferraria v. Vasconcellos*, 31 Ill. 25, was admitted by agreement. From the testimony in that case, and in the one before us, it is clear that, though no written law of the church may recognize the right of withdrawal, yet, since the separation of this body into the two branches of old and new school, the right of churches to transfer themselves from one to the other of these branches has been often exercised and tacitly acknowledged. But in the face of the facts we have already mentioned, it is unnecessary to discuss this question. The property of this church has been acquired partly under one organization and partly under the other; and inasmuch as the sole object of a court of chancery in cases of this character is to enforce a trust, and hold the trust property to the purposes for which it was originally given, no fairer or more equitable mode of doing this can be devised than the one adopted by the circuit court. It was the rule adopted by this court in the case already referred to, *Ferraria v. Vasconcellos*, *supra*, and is as applicable to this case as to that. It is not a case for forfeiture on one side or on the other of the entire property, because both parties really represent the Presbyterian Church, and teach the same religious faith; but inasmuch as the two branches of the church have distinct organizations, and as the property has come from both, it is just that the majority shall be permitted to change the

church connection without forfeiture, while the right of the minority to remain in the existing relations, and retain their portion of the property, should be equally recognized.

It is further objected by appellants that the rule adopted March 12, 1865, by which the right of voting in matters pertaining to the congregation was thenceforth to be confined to persons contributing to the expenses thereof, was unreasonable, and contrary to the usages of the denomination, inasmuch as it denied a vote to certain members of the church in regular standing. The propriety of the rule may well be questioned, but as the record shows that no practical harm to the minority arose therefrom, the fact of its adoption is not a sufficient reason for overturning all these proceedings, and opening this quarrel afresh. This rule was adopted in March. In May the first vote was taken as to withdrawal, and a question having been raised on the regularity of that vote, the matter was again submitted to the congregation in June, and a resolution being offered to affirm the proceedings of the meeting held in May, it was carried by a vote of sixty-one to sixteen. At neither meeting was the right of voting denied to any member of the church seeking to exercise it. But besides this, it appears, by the report of the master, that there were, in all, but thirty-one members of the church who had ceased to contribute to its expenses, and who belonged to the old-school party; so that if every one of those disqualified by the rule, and belonging to that side, had been present at the June meeting, and voted adversely to the resolution, it would still have been carried by a majority of fourteen votes. Since, then, the members to whom the rule applied were not present asserting their right, and since, if they had been, and the right had been conceded, the result would have been the same, the adoption of the rule of March 12th is not sufficient ground for reversing the decree. That a very large majority of this church and congregation were in favor of withdrawal is clearly shown in this record, and indeed is not denied.

It is said the right to vote should have been confined to church members. We are not of that opinion. It often happens that persons belonging to the congregation, but not members of the church proper, are among the largest contributors to the erection of church edifices and to the support of a clergyman, and on a question affecting the property of the congregation, their right to a voice cannot be reasonably questioned.

It is assigned, as a cross-error, that the court, in making partition of the property, did not include, in the new-school party, certain persons who were neither members of the church nor pew-holders, but were still members of the congregation. But we are of opinion that the court acted wisely. Mathematical nicety, in a matter of this sort, is not attainable or important. The precise number of persons who may, in a general sense, be called members of a religious congregation, it would be very difficult to determine, nor would it be easy to fix an age at which the children of a family should be held no longer represented by their parents. The only clear and satisfactory rule is that adopted by the circuit court, counting church members by virtue of their membership, and counting, in addition, as permanent members of the congregation, all pew-holders, as it is by the rental of the pews, or a tax upon the holders, that the church is sustained.

It is also urged that the court improperly included, in the basis of its decree, certain persons who had not for a considerable period attended the church. But the church records showed that, at the date of the last vote, they were members in regular standing, and it further appears they still resided within the bounds of the church. On this question, the court properly held the church records conclusive.

After having carefully examined this record, we are of opinion that the decree of the circuit court administers substantial justice, and it must be affirmed.

Decree affirmed.

RELIGIOUS SOCIETY, RIGHT OF TO PRESCRIBE RULES for preserving order when met for public worship: *McLain v. Matlock*, 65 Am. Dec. 746; may join in submission to arbitration claim to use of meeting-house: *Curd v. Wallace*, 32 Id. 85.

PEW-HOLDERS, RIGHTS AND REMEDIES OF: *O'Hear v. De Goesbriand*, 89 Am. Dec. 653, and extended note 662.

UNINCORPORATED RELIGIOUS ASSOCIATIONS, powers and liabilities: *Phipps v. Jones*, 59 Am. Dec. 706; *Reformed P. D. Church v. Mott*, 32 Id. 613.

THE PRINCIPAL CASE IS CITED to the point that church property, vested in the trustees of a religious body, is held under a trust, and that a court of chancery will enforce the trust, and hold the trust property to the uses for which it was originally given, in *Nelson v. Benson*, 69 Ill. 31.

ÆTNA INSURANCE COMPANY v. STIVERS.

[47 ILLINOIS, 86.]

INSURERS OF SAFE CARRIAGE OF STOCK ARE LIABLE FOR ACCIDENT to the stock while being transhipped from cars to a boat, under a policy which covered, with the usual exceptions, the perils of railway and river, and by special indorsement fixed the places of shipment and destination, and the route to be taken.

ACTION on an insurance policy. The facts are stated in the opinion.

A. J. Gallagher, for the plaintiff in error.

Nelson and Roby, for the defendant in error.

By Court, **LAWRENCE, J.** This was an action on a policy of insurance to recover the value of a mule. It appears by the proof that when the mules arrived at Cairo they were unloaded from the cars to a platform three or four feet high, from the end of which they were driven down an inclined plane for the purpose of being taken aboard the boat. Some of them walked down and some jumped down. One of them fell as it jumped, and died within an hour afterward, as was supposed, from some internal injury received in the fall.

The policy covers, with the usual exceptions, the perils of railway and river, and by a special indorsement it fixes Decatur, Illinois, where the mules were shipped, as the place of commencement of the risk, and Vicksburg, Mississippi, to which point they were to be sent, as the place of its termination. The route specified in the indorsement was by the Illinois Central road, from Decatur to Cairo, and by boat from Cairo to Vicksburg. The object of the policy was to effect an insurance against the perils of transportation from Decatur to Vicksburg.

A recovery is resisted on the ground that the mule came to its death from a peril not covered by the policy, and it is asked by the counsel for plaintiff in error whether the company would have been liable if the owner of the mules had kept them in a stable at Cairo for a few days waiting for a boat, and one of them had injured himself during that time by jumping. Without answering that question before it arises, it is sufficient to say that is not the present case. This mule was injured in the very act of being unloaded. The peril of being unloaded at Cairo was an unavoidable incident to the transportation from Decatur to Vicksburg, and of the very

class against which it was the design of the parties, the one to give, and the other to obtain, a guaranty. The company by this policy took upon itself, with the usual exceptions, the perils of railway and river from one of these points to the other, specifying that the transshipment was to take place at Cairo, and it cannot be permitted to deny that it thus took upon itself the perils incident to the transshipment. The transportation from Decatur to Vicksburg was, in the purview of this policy, a continuous transportation, and covered the transshipment from car to steamer as completely as any other portion of the route: Arnould on Insurance, 429 et seq., and notes; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. 38; *Coggshall v. Am. Ins. Co.*, 3 Id. 283. The peril of unloading at Cairo was a peril happening, not after the termination of the risk by the arrival of the mules at Vicksburg, but one occurring midway in the transportation, and inseparable from it. It falls under the head of "perils of railway," named in the policy, and the owner of the mules is protected against it by both the spirit and letter of the policy. The judgment of the circuit court is affirmed.

Judgment affirmed.

WHAT LOSSES DEEMED WITHIN POLICY OF INSURANCE: See *Hillier v. Allegheny County Mut. Ins. Co.*, 45 Am. Dec. 656, and note 657.

INSURANCE POLICY IS LIBERALLY CONSTRUED in favor of the insured: *West. Ins. Co. v. Cropper*, 75 Am. Dec. 561, and cases collected in note 563; *National Fire Ins. Co. v. Crane*, 77 Id. 289; *Morrison v. Insurance Co.*, 59 Id. 304, note.

OETGEN v. ROSS.

[47 ILLINOIS, 142.]

ONE WHO ENTERS UNDER DEFENDANT IN EJECTMENT, AFTER SUIT COMMENCED, TAKES AND HOLDS the possession subject to the judgment to be rendered in the suit, though not made a party to it.

LANDLORD CANNOT BE SAID TO HOLD UNDER HIS TENANT, where he resumes possession of the demised premises after the commencement of a suit in ejectment against his tenant, and after the term has expired.

ILLINOIS EJECTMENT ACT REQUIRES TENANT SUED IN EJECTMENT TO NOTIFY his landlord, under a penalty for not doing so; and the landlord can appear and defend in the name of his tenant, or may be made a co-defendant in the suit. After such notice, and an opportunity to defend, the landlord will be concluded by a judgment for the plaintiff, and liable to be evicted, if the premises have been surrendered to him, though the judgment may have been only against the tenant, in name.

LANDLORD, TO WHOM TENANT HAS SURRENDERED POSSESSION PENDING SUIT IN EJECTMENT against the latter, cannot be evicted by a writ of possession issued on the judgment against the tenant, where he had no notice of the pendency of the suit, and was chargeable with no fault or laches. In such case, the writ should be stayed, on the motion of the landlord, until he can be made a party to the existing suit, and a trial be had upon the merits.

IN DETERMINING QUESTION OF LACHES ON PART OF LANDLORD, IN NOT MOVING at an earlier day to set aside a judgment by default in ejectment taken against his tenant, after he had knowledge of it, the fact that up to the time of making his motion no writ of possession had been issued should be taken into the account.

WHETHER PLAINTIFF IN EJECTMENT WHO FAILS TO TAKE OUT HIS WRIT OF POSSESSION for a year after judgment is entitled to it without a special order, *quære*.

COURT THAT RENDERS JUDGMENT IN EJECTMENT SUIT EXERCISES a species of equitable jurisdiction over the writ of possession, recalling it if justice requires, and sometimes, after execution, awarding a writ of restitution.

EJECTMENT. The facts appear in the opinion.

H. B. McClure and G. Pollard, for the appellant.

M. McConnel, for the appellees.

By Court, LAWRENCE, J. At the March term, 1860, of the circuit court of Cass County, John W. Ross and Sarah A. Ross recovered a judgment by default, against Louis Zimmer, in an action of ejectment. At the March term, 1861, Oetgen appeared as the landlord of Zimmer, and, on his application, the judgment by default was set aside, and a plea was filed in his name and that of Zimmer. At the September term, 1864, the cause was again tried, and a judgment rendered for the plaintiffs. The defendants brought the record to this court, and cross-errors having been assigned, by consent it was held that the judgment by default had been improperly set aside, and the order setting it aside was reversed: *Oetgen v. Ross*, 36 Ill. 335. The judgment on the trial was also reversed, the case not having been properly before the court; but before the decision of this court was announced, this judgment of the September term, 1864, was vacated under the statute, by payment of costs. That judgment thus ceased to exist, independently of the action of this court. The cause, having been remanded from this to the circuit court, was redocketed against Oetgen, as landlord, and Zimmer, as tenant, and a motion was made for a writ of possession on the judgment by default. Oetgen resisted the mo-

tion, but it was allowed, and he prayed an appeal, which was granted.

There could be no objection to a writ of possession against Zimmer, but he has not been in possession since 1860, and the actual question argued by counsel is the right to evict Oetgen upon the judgment by default obtained against his tenant, Zimmer, at the March term, 1860. It appears Zimmer gave Oetgen no notice of the pendency of the ejectment, and no writ of possession has ever been issued on the judgment.

A person entering under a defendant in ejectment, after the commencement of the suit, must of course be considered as taking and holding the possession subject to the judgment to be rendered in the suit, though not made a party to it. In no other way could the action of ejectment, or any possessory action, be made effective. The person thus entering cannot complain that he is evicted without being brought into court, because, in entering under the defendant, he takes only his rights, and can defend in his name. But a landlord who resumes possession of the demised premises, after the commencement of an ejectment against his tenant, the term having expired, cannot be said to hold under his own tenant. Sections 29 and 31 of our ejectment act make the judgment conclusive only as against persons claiming under either party by title accruing after the commencement of the suit. This language cannot apply to a landlord taking possession after the lease of his tenant has expired. Neither his title nor possession has accrued since the commencement of the suit.

What, then, should be the rule in regard to landlords? The statute requires a tenant sued in ejectment to give immediate notice to his landlord, under a penalty for not doing so. On the receipt of such notice, the landlord can appear and defend in the name of the tenant, or can have himself made a co-defendant. Where a landlord has been thus notified by his tenant, or otherwise, of the pendency of the suit, and has an opportunity to defend, he must be held to be concluded by a judgment for the plaintiff, and liable to be evicted if the tenant has surrendered the possession to him, though the judgment may have been only against the tenant in name. But this liability to eviction under such a judgment proceeds, not from the idea that the landlord is in possession by a right derived from his own tenant, but from the fact that the action of ejectment must be brought against the person in actual possession;

and when brought against a tenant, and the landlord is duly notified, he is to be regarded as really in court, with full power to control the defense so far as may be necessary for his own interests, or to have himself made a party defendant on the record.

But if the tenant fails to give his landlord notice of the pending suit, and suffers a judgment to be recovered against himself, can the landlord, to whom the tenant has redelivered the possession pending the suit, and who has had no knowledge of such suit, or opportunity of asserting his rights, be evicted by a writ of possession issued on the judgment against the tenant? This would violate that most familiar principle of law and justice which forbids the rights of any person to be taken away without a hearing. If it should be made clearly to appear, as it does in the case before us, that the landlord had no notice of the suit, and if chargeable with no fault or laches, the court, on motion, would stay the writ of possession as against him. This, however, should be done without impairing the rights of the plaintiff by compelling him to bring a new suit. A bar, under the statute of limitations, might prevent his recovery in a new suit, but not be available as a defense in the suit already instituted. The writ of possession should therefore be stayed, on the motion of the landlord, only until he can be made a party to the record in the existing suit, and a trial be had upon the merits. The parties will thus occupy the same position they would have held if the landlord had received notice of the suit before judgment passed against the tenant. He will have an opportunity to be heard before losing his property, and the plaintiff will have the benefit of his suit against the tenant in the determination of any questions that may arise under the statute of limitations.

In the case before us, the judgment upon which it is sought to evict the landlord was rendered against the tenant, without notice to the landlord, or knowledge on his part of the pendency of the suit. This is clearly shown, and not controverted. Under the rules above stated, he should not be evicted upon this judgment. It is urged that he was guilty of laches in not moving at an earlier day to set aside the judgment by default after he had knowledge of it. But he made this motion at the March term, 1861, and it appears no writ of possession had been issued up to that time. The knowledge of the judgment came to him first in the fall of 1860, it does not appear at what precise time, but if after the fall term, the application

was made at the earliest day possible. But even if he was informed of the judgment before the fall term, the fact that the plaintiffs were not enforcing it should be taken into the account in determining the question of laches. Where a plaintiff in ejectment fails to take out his writ of possession for a year after judgment, it is doubtful if he is entitled to it without a special order. In view of all the circumstances of this case, we do not think the landlord has lost his right to insist on a hearing before the writ of possession issues against him. The judgment against Zimmer must, of course, stand, but before the court allows the present motion for a writ of possession against both Zimmer and Oetgen, it should direct a trial between the plaintiffs and Oetgen, who is already a party to the record. It is to be remarked that, in the action of ejectment, the court that renders the judgment exercises a species of equitable jurisdiction over the writ of possession, recalling it if justice requires, and sometimes, after it has been executed, awarding a writ of restitution: *Coleman v. Henderson*, 2 Scam. 251; *Ex parte Reynolds*, 1 Caines, 500; *Jackson v. Hasbrouck*, 5 Johns. 366; *Doe ex dem. Troughton v. Roe*, 4 Burr. 1996.

It would probably have been the better practice, when this case was formerly before us, to have passed on the errors assigned by the appellant, instead of resting our decision solely on the cross-error assigned, and reversing the second judgment because the parties were not really before the court. But it has been of no practical consequence in this suit, inasmuch as the second judgment was set aside, under the statute, in the circuit court, by payment of costs.

Judgment reversed.

JUDGMENT IN EJECTMENT, WHO CONCLUDED BY: *Caperton v. Schmidt*, 85 Am. Dec. 187, and note 208; one not a party cannot be dispossessed under judgment in: *Garrison v. Savignac*, 69 Id. 448; but all who enter upon land pending action of ejectment are subject to removal by the final process: *Walton v. Huff*, 65 Id. 49, and note 52.

JUDGMENT IN EJECTMENT IS CONCLUSIVE AGAINST DEFENDANT FOR ALL PROFITS accrued since the date of the demise stated in the declaration in ejectment: *Apalachicola v. Apalachicola Land Co.*, 79 Am. Dec. 284, and see note 295.

APPEARANCE OR SUBSTITUTION OF LANDLORD IN ACTION OF EJECTMENT should be entered of record, and only allowed upon notice to the parties: *Dutton v. Warschauer*, 82 Am. Dec. 765.

WHERE LANDLORD, AT REQUEST OF TENANT, APPEARS IN ACTION OF EJECTMENT without any order of record, and conducts the defense to judgment in the lower court, it will be too late to object in the appellate court for the want of such order: *Dutton v. Warschauer*, 82 Am. Dec. 765.

LANDLORD WHO IS PERMITTED TO DEFEND EJECTMENT SUIT IN PLACE OF HIS TENANT can only make such defense as his tenant could make: *Sinclair v. Worthy*, 84 Am. Dec. 357.

WHEN JUDGMENT AGAINST TENANT MAY BIND LANDLORD. — It is stated, in general terms, that when a recovery in ejectment is had against a tenant, the landlord is bound by it: *Hanson v. Armstrong*, 22 Ill. 442. But he is not so bound unless he had notice of the pendency of the action: *Lowe v. Emerson*, 48 Id. 162, citing the principal case; *Chant v. Reynolds*, 49 Cal. 213; and it is the duty of the tenant, when sued in ejectment, to notify his landlord of such suit: *Lowe v. Emerson*, 48 Ill. 160. The tenant cannot justify his attornment to a third party by merely showing that such party has recovered a judgment against him for the possession of the demised premises, but he must also show that his landlord was notified of the pendency of the action, and had an opportunity to defend; otherwise the landlord is neither bound nor estopped by the judgment: *Douglas v. Fulda*, 45 Cal. 592; and see *Thompson v. Pioche*, 44 Id. 508. The tenant cannot be permitted to take advantage of his own wrong: *Lowe v. Emerson*, 48 Ill. 160, 162. A judgment in ejectment, obtained by collusion between the plaintiff and the tenant, will not bind the landlord: *Stridde v. Saroni*, 21 Wis. 173. In such case, the landlord would be relieved by the court in which the action was brought: *Reay v. Butler*, 69 Cal. 572, 583; and see *Hough v. Hammond*, 36 Tex. 657. In Texas, if judgment is recovered in an action against the tenant, without notice to the landlord or reversioner, he may, after the expiration of the term, have the judgment set aside, and be admitted to defend the suit: Id. It has been held that a judgment in ejectment against the tenant was not conclusive upon the landlord, although the latter retained an attorney to defend the suit against the tenant, and especially where the title, as between the plaintiff in the suit and the landlord, did not come in question: *Ryerss v. Rippey*, 25 Wend. 432. The record of the suit in such cases should be the test, as it respects the person against whom the verdict is rendered: Id.; *Cadwallader v. Harris*, 76 Ill. 370. And where the landlord was not a party on the record, he was held not to be bound by a judgment against his tenant, although the tenant set up the landlord's title as a defense, and the landlord was present at the trial assisting the tenant: *Samuel v. Dinkins*, 12 Rich. 172; and to the same effect, see *Maignaire v. Labeaume*, 7 Mo. App. 179. On the other hand, a judgment against the tenant has been held to conclude the landlord, where it appears that the latter knew of the suit, although he was not made a formal party thereto: *Rodgers v. Bell*, 53 Ga. 94; *Smith v. Gagle*, 58 Ala. 600. And where the tenant is sued in ejectment, and the landlord assumes the defense, and puts his title in issue, the judgment rendered therein binds him, as evidence by way of estoppel, the same as though he was made a party defendant: *Valentine v. Mahoney*, 37 Cal. 389. A judgment against the tenant in such case is a bar to a subsequent action by the landlord against the party recovering the judgment. It must appear, however, that the subject-matter or question was not only the same, but that it was submitted on the merits, and actually passed upon by the court: *Gray v. Dougherty*, 25 Id. 266; *Russell v. Mallon*, 38 Id. 259; *Altshul v. Polack*, 55 Id. 633; and see *Oetgen v. Ross*, 54 Ill. 79; *Sturdy v. Jackson*, 4 Wall. 174. And it is said that it would be dangerous to extend the rule to cases where there is nothing in the record to show that the landlord took the defense of the action upon himself: *Valentine v. Mahoney*, 37 Cal. 389, 399, concurring opinion of Sawyer, J.

In ejectment against a tenant in possession, whose landlord was dead, the administrator had notice of the pendency of the suit, and it was held that

if he could be regarded as ever having been the landlord of such tenant, he ceased to be such after the sale of the premises by him as administrator, and notice to him could in no way prejudice the rights of a purchaser at such sale previous to the commencement of the suit: *Oetgen v. Ross*, 54 Ill. 79, citing the principal case.

A recovery in ejectment by default against the vendee of land in possession, under an unexecuted contract of purchase, will not conclude the rights of the vendor, although he had notice of the pendency of the suit, and cannot be set up to defeat an action of ejectment subsequently brought by him for the same land. The relation of landlord and tenant does not exist between vendor and vendee: *Cadwalader v. Harris*, 76 Ill. 370, 373, citing and distinguishing the principal case.

The question whether the rule laid down in the principal case, that judgment against the tenant concludes the landlord, if he had notice of the pendency of the suit, holds only in actions of ejectment, and does not prevail in actions of forcible entry and detainer, is stated but not considered in *Hubbell v. Canady*, 58 Ill. 427.

CROSS v. PEOPLE.

[47 ILLINOIS, 152.]

IT NEED NOT BE AVERRED IN INDICTMENT FOR FORGING BANK CHECK that the instrument alleged to have been forged had the proper revenue stamp attached; and a conviction under such an indictment would be good, without proof of such fact, if the instrument was proved to be false and forged, and made with the intent charged.

INDICTMENT FOR FORGING PAPER PURPORTING TO HAVE BEEN MADE BY AGENT, in the name of his principal, need not aver the authority of the agent, or that it was so drawn; setting out the instrument *in hæc verba*, with an allegation that it was made with the intent to defraud the party whose name is signed to it, is sufficient under the statute.

INDICTMENT IS SUFFICIENT, if it be so plainly drawn that the nature of the offense may be easily understood by the jury.

OBJECTION FOR VARIANCE MUST BE TAKEN AT TRIAL. It is too late to make it on error.

OMISSION IN INDICTMENT FOR FORGING BANK CHECK, set out *in hæc verba*, of the figures denoting the number of the check, and also of the letter "C" written under the signature, is not variance.

AGENT'S AUTHORITY TO DRAW CHECKS FOR HIS PRINCIPAL WILL BE PRESUMED, in the absence of counter-evidence, where the proof shows that the agent was in the habit of signing his principal's name to checks, and which was permitted by his principal.

ACCOMPLICE IS ONE WHO IS IN SOME WAY CONCERNED IN COMMISSION OF CRIME, though not as a principal, and this includes all persons who have been concerned in its commission, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact.

LEGAL CONVICTION MAY BE HAD upon the uncorroborated testimony of an accomplice.

FOR PURPOSE OF IDENTIFYING PARTY AND TRANSACTION, and as *res gestæ*, evidence, on the trial of a party indicted for forgery, of another forgery committed by him, at the time of the commission of the offense for which he was on trial, is competent.

IT IS COMPETENT FOR WITNESS WHO OBTAINS HIS KNOWLEDGE OF ONE'S HANDWRITING by having seen him write to say whether another paper, or another word, or name, was in the same handwriting; and the fact that such witness had seen the party write but once does not go to the competency or admissibility of his evidence, but only to the weight which should be given to it by the jury.

INDICTMENT for forgery. The opinion states the case.

J. P. Walker, for the plaintiff in error.

W. K. McAlister and Charles H. Reed, for the people.

By Court, BREESE, C. J. The plaintiff in error was convicted at the June term, 1867, of the recorder's court of the city of Chicago, of forging a bank check, and sentenced to the penitentiary for six years.

He has brought the case here by writ of error, and alleges that the indictment is substantially and fatally defective, and no legal conviction could be founded on it.

The indictment is in the usual form, and alleges that the prisoner did, on the twenty-second day of September, in the year of our Lord 1866, in said city of Chicago, in the county and state aforesaid, unlawfully, feloniously, and falsely make, forge, and counterfeit a certain bank check for the payment of money, which said false, forged, and counterfeit bank check is in the words and figures following, to wit (setting out a copy of the instrument), with the intent to damage and defraud one Charles H. Beckwith, contrary to the statute, and against the peace and dignity of the same people of the state of Illinois.

This indictment describes the offense declared forgery by section 73 of the criminal code; and by section 162 of the same code it is provided that every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of this code, or so plainly that the nature of the offense may be easily understood by the jury; and section 163 provides that all exceptions which go merely to the form of an indictment must be made before trial, and no motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged in the indictment.

The defect in this indictment is alleged by the prisoner's

counsel to consist in the omission of the averment that the check was stamped in pursuance of the act of Congress of 1865, and that without a stamp it is void under that act, and he insists a forgery cannot be predicated of an instrument void in law.

We do not so understand, and have so decided in two cases, that the act of Congress providing for stamping declares them void if they have no stamp, but only if the omission to stamp them was with the intent to evade the provisions of the act; and we went still further, and held it was not within the constitutional competency of Congress to declare what should or should not be a valid instrument in a state, or what should be evidence in the courts of justice of the states; that while admitting the power to lay a tax in the shape of a stamp duty, a failure to affix the stamp could only be visited upon the offender by subjecting him to the penalty provided by the act: *Latham v. Smith*, 45 Ill. 29; *Craig v. Dimock*, 47 Id. 308. We do not believe Congress, by the act in question, intended to interfere with the criminal laws of any of the states, but it was for revenue purposes solely, and the party offending was made subject to a heavy penalty.

It is said by the counsel for the people that the check had in fact a stamp upon it, and was so proved on the trial.

With the views we entertain of the question, we should be inclined to hold that it was an immaterial fact, and the conviction would be good without such proof, if the check was proved to be false and forged, and made with the intent charged.

The next objection made by the prisoner's counsel is, that as the check on its face purports to be drawn by an agent, the indictment should allege the fact, and the authority of the agent to draw it.

The check purports to be signed "C. H. Beckwith," with the word "Randolph" underneath. The offense charged is forging a check with Beckwith's name to it, to defraud him, and it does not enter into the essence of the charge that another man signed it by the authority of Beckwith. It is usher'd to the public as a check signed by Beckwith; it is alleged it was false and forged, and made with the intent to damage and defraud Beckwith. If the party had no authority to draw the check in Beckwith's name, he might not be injured by it; but whether he had or not, is to be established on the trial. We do not remember a case, and we have not

been referred to one, where in the indictment for forging a paper made by an agent in the name of his principal, it was held necessary to aver the authority of the agent, or to aver it was so drawn; setting out the check *in hæc verba*, with an allegation it was made with intent to defraud the party whose name is signed to it,—is all that is necessary under our code of criminal procedure.

In the case cited of *Gutchins v. People*, 21 Ill. 642, the instrument set out in the indictment was one which could not, by the laws of this state, be valid if genuine. This case is very different. Is it not plain that Beckwith could be damaged by this check if uttered? The word "Randolph" does not explain itself; it may be, without explanation, a check word, or the name of the street in which Beckwith did business; at any rate, it requires parol evidence to explain its meaning. It appears to be Beckwith's own signature, and the averment is sufficient that the check purported to have been drawn by him, that it was false and forged, and made to defraud the man whose signature appeared to the check.

These objections go to the motion in arrest of judgment, and as we do not deem them valid, the motion in arrest was properly overruled. The offense was stated in the terms and language of the code, and so plainly that the nature of it could be easily understood by the jury: *Mohler v. People*, 24 Ill. 26; *Chambers v. People*, 4 Scam. 351.

It is complained by the prisoner's counsel that the court did not grant a new trial, for the reason, first, that the case, as alleged and charged in the indictment, was left unproved in its entire scope and meaning by the evidence.

This reason is predicated upon a supposed variance between the check described in the indictment and the one given in evidence.

The first answer to this is, that the original check was lost or destroyed, and a copy went in by consent of prisoner's counsel, and as no objection for variance was made on the trial, it is too late to make it on error: *Pearsons v. Lee*, 1 Scam. 193.

The variance consisted in the omission of the figures denoting the number of the check, and of the letter "C" attached to or written under "Randolph."

In a prosecution for counterfeiting bank notes, it has never been held necessary to set out the marks and ciphers, ornaments, devices, or mottoes on bank notes; and this court held,

in the case of *Quigley v. People*, 2 Scam. 301, that on the trial of an indictment for having in possession a forged bank bill, with intent to utter and pass the same, in which the bill was set out *in hæc verba*, but the letter "C" was omitted, and the bill introduced in evidence had this letter upon its face, it was held there was no variance.

The prisoner's counsel contends, second, that the case was left unproved in another respect,—that it was not proved that Randolph had any authority to sign Beckwith's name to any check.

On this point, Randolph stated, on his examination, that he was cashier for Beckwith, who was a wholesale grocer, and that he was in the habit of signing his name to the drafts of the company, and that Beckwith kept his accounts in the First National Bank. It was for the jury to decide, on these facts, if the authority to draw was proved. The evidence may not go to his authority to draw drafts, but he said he was in the habit of doing so, and if permitted by Beckwith, authority would be presumed in the absence of any counter-evidence.

The prisoner, by his counsel, further insists that the forgery was left unproved, for the reason that the only witness to the fact of forgery was Mooney, and that he was a self-acknowledged and self-condemned accomplice of the real forger, whoever he was; and that, in his statement that the prisoner was the forger, he was not corroborated by one word or fact of legal testimony.

Counsel for the prisoner, under this head of objection, admits that, in strict law, the jury may convict upon the uncorroborated testimony of an accomplice, but denies that in practice it is ever allowed to be done.

The doctrine may be all true, and respectable authority is vouched, that a conviction should not be had on the uncorroborated testimony of an accomplice, and that, too, in material points; but that the witness is an accomplice must be clearly shown. All the cases cited by the prisoner's counsel on this head show that the witness was "art and part" in the commission of the crime; but we fail to discover any evidence that Mooney was *particeps criminis*. If his statements are to be taken as true, and we do not see why they should not be, he was the dupe of the prisoner, and not an accomplice. An accomplice is defined to be one who is in some way concerned in the commission of a crime, though not as a principal; and

this includes all persons who have been concerned in its commission, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact: 4 Bla. Com. 331; 1 Phill. Ev. 28. Another definition of an accomplice is, one of many equally concerned in a felony, the term being generally applied to those who are admitted to give evidence against their fellow-criminals for the furtherance of justice, which might otherwise be eluded.

There is no evidence that Mooney was a fellow-criminal. He had not been accused of being in that relation to the prisoner, or arrested for complicity, and nothing was shown upon the trial to implicate him in any manner, except the fact that he took the check to the bank, received the money on it, and paid it over to his employer, he all the while supposing the check was genuine. He only became suspicious of the conduct of the prisoner when, on the same day, he requested him to get the Gardner check cashed. It was then the *denouement* occurred, and a full disclosure was made by the prisoner of his wicked avocation. The fact that Mooney did not then denounce the prisoner to the authorities is the only circumstance that raises the suspicion that he was a confederate and an accomplice. But admit he was an accomplice, the law is well settled that a jury may find a verdict upon the testimony of one in that position, if he is not corroborated.

This question was discussed by this court in the case of *Gray v. People*, 26 Ill. 344. One Porter was the principal witness against Gray, the prisoner, and Van Allen, who were indicted for burglary and larceny; and he stated on his examination that he was one of the men who committed the burglary, and the prosecutor admitted that Porter was an accomplice, and that he had been separately indicted for the offense, but had not been arraigned, nor had he pleaded to the indictment. The circuit court overruled the objection made by the prisoner's counsel to his testifying, and an exception was taken. The cause came to this court on this exception.

Here it was insisted that Porter was an approver, and disqualified by the seventeenth section of the criminal code, which declares that approvers shall not be allowed to give testimony. After defining who is an approver, the court said: "Porter was in no sense an approver. He was not indicted with Gray and Van Allen. He was an accomplice, and be-

ing such, turned state's evidence, no doubt, with the hope of escaping a prosecution. The evidence of such persons is, in general, admissible against the prisoner on trial. Hawkins, in his Pleas of the Crown, b. 2, c. 46, sec. 94, says: 'The rule is founded on necessity, since if accomplices were not admitted, it would frequently be impossible to convict the greatest offenders.'"

In this case, it was also objected that the testimony of the accomplice was not corroborated. This, the court said, was no objection, and referred to a case tried before Justice Buller, in which, on reference to the twelve judges, they were unanimously of opinion that an accomplice alone is a competent witness, and if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal, referring to *Atwood's Case*, 1 Leach, 464. In *Jones's Case*, 2 Camp. 132, Lord Ellenborough observed: "That judges in their discretion will advise a jury not to believe an accomplice unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes: *Commonwealth v. Bosworth*, 22 Pick. 397; *Commonwealth v. Savory*, 10 Cush. 535; and this seems to be the more modern and approved doctrine. It is a matter of discretion with the court to advise rather than a rule of law: 1 Phill. Ev. 34-39; McNally on Evidence, 197.

If a jury believe the testimony of an accomplice, who may have been induced to make disclosures from remorse or from any other motive, why should they not be allowed to credit him? Is he in a position different from any other witness whose credibility is to be inquired into by the jury? We can see no real difference.

It is further objected by the prisoner that the court below erred in admitting the testimony of Mooney in reference to the Gardner check.

This objection is made on the hypothesis that Mooney was an accomplice of the prisoner, and the case of *Kinchelov v. State*, 5 Ilumph. 9, cited as in point.

In that case, the only witness against the prisoner was an accomplice in the crime, and the court held he could not be permitted, with a view to corroborate his statements, to give evidence of other larcenies proposed and planned by the prisoner at the time of the commission of the larceny for which he was indicted.

We think the case was well decided, but fail to see its applicability to this case, Mooney not standing in the position of an accomplice. He was a witness for the prosecution, no charge existing against him of any complicity in the crime with which the prisoner was charged.

We are of opinion the evidence in regard to the check on Gardner & Co., which the witness refused to take, and which aroused his suspicions that the Beckwith check was not right, and which caused the development of the whole transaction, and of the character of the prisoner, was competent, as identifying the party and the transaction, and as *res gestæ*. The mode of operating was, at the time, explained by the prisoner to the witness; how he obtained a genuine check from Beckwith by purchasing a small quantity of tobacco, giving a bank bill of one hundred dollars in payment, and, at his own suggestion, taking a check for the difference. The prisoner then had in his possession a check forged on F. B. Gardner & Co. for three thousand dollars, and a genuine one for eighty dollars, and he went on to explain to the witness in what manner he got the Gardner check, and getting a new stamp, which accorded with the mode he pursued in getting the Beckwith check. This evidence was not for the purpose of proving the prisoner guilty of another felony, in forging the check of Gardner & Co., but for the purpose of identifying him, and giving character to the entire transaction.

As put by the people's attorney, if a forger have two forged checks in his possession at the same time, and he admits that he accomplished the crime by the same identical means, although these forgeries were committed on separate parties, still the crimes are connected, and form part of the transaction, — a part of the *res gestæ*.

It is further complained by the prisoner that the court admitted in evidence against him the registers of the Briggs House and Adams House.

These "houses" are understood to be public hotels in the city of Chicago, and on the register of the Briggs House, under date of Saturday, September 15, 1866, was the name "J. B. Bruce," proved by the book-keeper, who also proved that this Bruce left that house on the 20th of September, 1866, for the Adams House.

The keeper of the billiard-room and bar-room of the Adams House produced and proved the register of that house, which contained a name, "Alfred Bruce," under date of Thursday,

September 20, 1866. This witness also stated that in September, 1866, he was the keeper of the billiard and bar room of this house, and saw the prisoner there, but was able to identify him by his small feet alone. These registers, against prisoner's objection, were duly proved, and were put in evidence.

Two experts were then called by the prosecution, who gave it as their opinion that the name "J. B. Bruce," on the register of the Briggs House, and that of "Alfred Bruce," on the Adams House register, were in the same handwriting.

Calvin D'Wolf and T. B. Brown, who had seen the prisoner sign his name to the recognizance he had entered into for his appearance in this cause, testified that the names on the hotel registers and the signature to the recognizance were in the prisoner's handwriting.

And in this connection, the prisoner further complains that here was proof allowed of handwriting by comparison, which was not legal.

We will consider these objections together. The object of this testimony was to show that the prisoner was at Chicago about the time the forged check bore date.

Mooney stated, on his examination, that the prisoner had been introduced to him at the Continental Hotel in Philadelphia, by one Clark, as Mr. Bruce; that he had received a letter from him signed "J. B. Bruce," inviting him to come to Chicago and be a clerk for him.

It is proved that the name "J. B. Bruce" is found on the register of the Briggs House on the 15th of September, 1866; that he left that house for the Adams House on the 20th, and the name "Alfred Bruce" is found on the register of that house under that date. These experts, Dox and Tolman, were not introduced to prove the handwriting of the prisoner by comparison, but only to prove that the names "J. B. Bruce" and "Alfred Bruce" were written by the same person. The object of the prosecution was to show the same person wrote both names, and the evidence of experts is always received for such purpose. Neither of these experts pretended to say by whom the names were written, but merely that they were written by the same person.

D'Wolf and Brown had seen the prisoner write, and from the knowledge of his handwriting thus acquired, they gave it as their opinion the entries on the hotel registers, and the signature to the recognizance, which they had seen the prisoner place there, were in the same handwriting.

The fact that D'Wolf and Brown had seen the prisoner write but once does not go to the competency or admissibility of their evidence, but only to the weight that should be given to it by the jury. They had seen the prisoner write, and were clearly competent to say, having obtained a knowledge of his handwriting in this way, whether another paper, or another word or name, was in the same handwriting: 1 Greenl. Ev., sec. 690, 691; 1 Phill. Ev. 491.

Here proof was made by D'Wolf and Brown of the prisoner's handwriting, not by a comparison of hands, but by having actually seen him write. They were at liberty to refresh their recollection by looking at the signature to the recognizance which they had seen the prisoner make, and then give their opinion as to the entries on the hotel registers. We see no error here.

The remaining objection by the prisoner is, that the court excluded, as evidence on his behalf, a receipt executed by one George Randolph, for board in Cleveland, Ohio, and dated September 28, 1866. The receipt purported to be for the board of the prisoner at the house of Randolph, in Cleveland, from September 4 to September 28, 1866.

Randolph was on the stand, and had testified, and so had three other witnesses for the prisoner testified, that he had been all the time, from the 4th to about the 28th of September, at the house of Randolph, confined by rheumatism; and on going away, Randolph had given him a receipt.

Now, as all this evidence was in, we cannot perceive how it could have aided the prisoner the slightest to have the receipt go in. It did not add a particle to the force of the testimony of all these witnesses that the prisoner was at Cleveland, confined with rheumatism at Randolph's house, from the 4th to the 28th of September, and its rejection could not have injured his cause in the least.

In looking through this entire record, we cannot but be of the opinion that the prisoner has had a fair trial, and cannot find that any rule of law has been improperly applied to him, or that he has been deprived of the benefit of any and every rule of law that could be invoked in his behalf. We find no such errors as have been assigned, and consequently must affirm the judgment.

Judgment affirmed.

strament in indictment for: *State v. Morton*, 65 Id. 201, and note 206; *State v. Brown*, 70 Id. 168; distinction between, and signing name of another without authority: *Commonwealth v. Baldwin*, 71 Id. 703.

ACCOMPLICE, COMPETENCY OF TESTIMONY OF: *Commonwealth v. Price*, 71 Am. Dec. 668, and note 671.

HANDWRITING, PROOF OF GENERALLY, and by comparison of hands: *Hamley v. Gandy*, 91 Am. Dec. 315, and cases collected in note 320.

TOLEDO ETC. RAILROAD CO. v. RODRIGUES.

[47 ILLINOIS, 182.]

RAILROAD COMPANY MAY, IN EXERCISING ITS FRANCHISES, INCUR LIABILITY for expense on account of injury received by its employees, although the charter may not, in terms, authorize the company to incur such expense.

IT IS SUFFICIENT CONSIDERATION TO SUPPORT EXPRESS AGREEMENT to pay for the nursing and medical attendance necessary to the cure of a railroad employee, that he was disabled while in the employ of the company, and in the discharge of his hazardous duties.

IT IS WITHIN SCOPE OF AUTHORITY OF GENERAL SUPERINTENDENT OF RAILROAD TO BIND the company, on his consent implied, for the payment of expenses incurred on account of injuries received by the company's employees.

RAILROAD SUPERINTENDENT MAY BIND COMPANY BY CONSTRUCTIVE CONSENT. An employee of a railroad company was injured while in the discharge of his duty, and the station agent, as such, procured a nurse and medical attendants, promising that the company would pay such expenses. He then wrote to the general superintendent stating the facts. *Held*, that it must be presumed that the letter was received, and in the absence of any answer thereto, that the superintendent consented on the part of the company to assume the liabilities of the station agent.

ACTION to recover for services rendered. The opinion states the case.

Robertson and Barnes, for the appellant.

H. J. Atkins, for the appellee.

By Court, WALKER, J. It appears from the record in this case that one Johnson, while in the employment of the railroad company as a brakeman, was run over by a locomotive and injured; that the station agent at Jacksonville, where the injury occurred, employed appellee to nurse and take care of Johnson, and told appellee that appellant would pay him for his services. Appellee performed the services, and presented his bill to the station agent for payment. He wrote to the general superintendent, making a full statement of all that had been done, but there seems to be no evidence that this let-

ter was received. After the account was rendered, the general superintendent conferred with the station agent in reference to the various items, and as to whether the charges were reasonable, when the superintendent said if they were reasonable he would pay the account, and made no other objections at the time.

On the trial below, and in this court, it is insisted that these agents acted without authority, and that there is no legal obligation resting upon appellant to pay for these services, notwithstanding the employment by the station agent, and the recognition of his contract by the general superintendent of the road. Although the charter of the company may not, in terms, authorize the body to incur expense on account of injury received by their employees in the discharge of their hazardous employment, yet it will not be seriously contended but that they may, in exercising their franchises, incur such a liability.

If, from the necessary hazards of the employment, a person devoting his energies in promoting the interest of the company, at a moderate compensation, without fault on his part, is severely injured, and for a length of time is wholly disabled, humanity, if not strict justice, would say that when the company have employed others to take the care and incur the expense of his cure, they should be compelled to observe their contract, and meet the expense.

When an employee has been disabled, and rendered helpless, in the employment of the company, we can see no reason why this is not a sufficient consideration to support a promise to pay for the nursing and medical attendance necessary to his cure, when the agreement is express and not by implication. To have that effect, there should at least be a request to perform the service. It is not such a duty resting on the company that any person, without authority from the company, may render the service, and compel payment. The request should be express and explicit, and from a person who is empowered to act for the company.

In this case appellee was requested to render the service by the local agent intrusted with the affairs of the company at that station. He wrote soon after to the general superintendent, informing him of what had been done. Having written in the usual course of business, we must presume that the letter was received. Again, there is no evidence that he countermanded the order, and not only so, but he, when the bill was

presented for payment, recognized the validity of the contract and said he would pay reasonable charges for the services, and based his only objection upon the high prices charged. This, in our judgment, made a clear case for a recovery, for a reasonable compensation, if these officers had authority from the company to incur the liability.

Whether the station agent had such power or not, the general superintendent was clothed, and necessarily must be, with large specific as well as discretionary powers. As his title implies, he has a general superintendence of the business affairs of the road, and we deem it but a reasonable inference to conclude that this was within the scope of these powers, and when exercised, that the company must be held liable. The corporation is governed within the limits of its charter by the adoption of rules and regulations for the purpose. These regulations govern the action of its officers. By them they confer powers and impose duties on their various agents and officers; and by this means they exercise their franchises. These regulations are private, and not accessible to the public, and hence the difficulty of other persons showing, except by inference or circumstantial evidence, that any officer performs any act within the scope of his authority. It would, therefore, be unreasonable to require positive proof of such authority. That fact must be left to proof, as in other cases. And when it is known that the general superintendent manages all the business of the road within his department, and binds the company by contracts on its behalf, in regard to its general business, it may be safely inferred that such a contract as this was within the scope of his authority.

Although the instructions may not have been strictly accurate, we do not see that they could have misled the jury. Even if they were not all precisely applicable to the evidence, the finding of the jury was clearly right, and the rejection or proper modification of any of them could not have changed the result. The judgment of the court below must, therefore, be affirmed.

Judgment affirmed.

CORPORATION MAY BE CHARGED FOR SERVICES RENDERED FOR ITS BENEFIT, by persons employed by its officers or agents acting within the scope of their authority, or where the employment is unauthorized, but the services are performed with the knowledge of the directors, and received by them without objection: *Hooker v. Eagle Bank*, 86 Am. Dec. 351, and note 354; *Pitney v. West. Pac. R. R. Co.*, 91 Id. 623, and note 636.

THE PRINCIPAL CASE IS CITED to the point that where a railroad station agent engages a surgeon to attend an employee injured in the service of the company, although such act is unauthorized, yet the company will be liable, if, upon due notice given to the general superintendent, the act is not repudiated, in *Toledo etc. R. R. Co. v. Prince*, 50 Ill. 27; *Cairo etc. R. R. Co. v. Mahoney*, 82 Id. 75; and is cited to the same effect in *Indianapolis etc. R. R. Co. v. Morris*, 67 Id. 296, where the services were performed at the request of the conductor of the railroad company.

GARDNER v. LADUE.

[47 ILLINOIS, 211.]

FOREIGN WILL — ADMISSIBILITY OF IN EVIDENCE. — A will made and probated in a foreign state according to the laws thereof, and duly certified in the mode required by the Illinois statute, is admissible in evidence in the latter state, though proved by but one subscribing witness.

ESTOPPEL — ACQUIESCENCE IN CASE OF MISTAKE. — Patents for certain lands were issued to two persons bearing the same name, and by a mistake in their delivery each got the other's patent, but acquiesced and took the land described in the patents as received by them, and profited out of the same: *held*, that each of them and their representatives were estopped from raising the question of such mistake, and claiming the land of the other.

ACTION of ejectment. The facts appear in the opinion.

W. C. Hooker and G. Edmunds, Jr., for the appellant.

H. W. Draper and N. Bushnell, for the appellees.

By Court, BREESE, C. J. This was an action of ejectment, in the Hancock circuit court, by Peter A. Ladue, against Samantha Gardner, and a verdict and judgment for the plaintiff.

The land in controversy was described as the southeast quarter of section 35, township 7 north, range 7 west, of the fourth principal meridian, in Hancock County.

The plaintiff, to prove title in himself, was required to produce the will, or a certified copy thereof, of one Isaac J. Blauvelt, to whom the patent issued from the United States. He produced a certified copy of such will, dated September 16, 1825, admitted to probate May 1, 1826, before the surrogate of Rockland County, New York, by which he bequeathed all his estate, real and personal, to his wife Sarah. The will was signed "Isaac I. ^{his} x ^{mark} Blauvelt."

Defendant objected to the introduction of this will, but, we are of opinion, without satisfactory grounds.

The copy of the will was duly certified in the mode required by the laws of this state: *Scates's Comp.* 1129; *Shepard v. Carriel*, 19 Ill. 313. .

As to the objection that the will was proved by one only of the subscribing witnesses to it, it is sufficient to say that by the laws of the state of New York, under which this will was made, but one witness was necessary to prove its execution: *Jackson v. Lugerere*, 5 Cow. 224. There the court say: "It is necessary in every case to establish the fact that the testator executed the will in the presence of three witnesses; or, in cases where such proof does not exist, to give other evidence from which it may be presumed. This may be done by calling one or more of the witnesses to prove the execution agreeably to the statute," etc.

This case resembles the fanciful one portrayed by the great author in his *Comedy of Errors*, in which Dromio of Ephesus and Dromio of Syracuse are the principal characters. Here the principal characters are Isaac Blauvelt of Hartill's company of the 27th Regiment of United States Infantry, in the war of 1812, and Isaac Blauvelt of Captain Crane's company in the same regiment. Both these Isaacs were entitled to military bounty land, and we are satisfied from the testimony that the patent issued for the one Isaac came to the hands of the other Isaac. That patent for the land in question, in Hancock County, was sent to the deceased Isaac is unquestionable from the testimony, for Benjamin Wood proves it came into that Isaac's possession soon after it was issued, and so remained up to the time of his death.

The other Isaac, in 1822, procured an exemplification of the patent to the Marshall County land, being the southwest quarter of section 17, township 12 north, rang 9 east, and sold it in 1846. Admitting then, that under the warrants issued to these "Dromios," the patents should have been differently issued, yet the other Isaac, in selling the Marshall County tract, claimed the benefit of that patent by selling it; the devisee of this Isaac, in selling the Hancock County tract, claimed the benefit of that patent. The plaintiff, by deducing title, through this devisee of the Hancock tract showed a *prima facie* legal title by his papers; therefore neither the Isaac who received the patent for the Marshall County land and sold it, nor his grantees, nor any other person, can raise the question of a mistake in the delivery of the patents. Both the Isaacs have acted on the facts existing at the time, and both have

profited by the bounty of the government, without any objection on the part of either. Each of them, and their representatives or assignees, would be equally estopped from claiming the land of the other. We see no error in the judgment of the circuit court, and therefore affirm the same.

Judgment affirmed.

EFFECT OF WILL ADMITTED TO PROBATE IN ANOTHER STATE: *Bowen v. Johnson*, 73 Am. Dec. 49, and note 53, 56; *Olney v. Angell*, 73 Id. 62.

PRINCIPLES ESTABLISHED IN ENGLAND APPLY TO AND GOVERN CASES ARISING UNDER PROBATE LAW OF THIS COUNTRY: *State v. McGlynn*, 81 Am. Dec. 118.

ESTOPPEL IN PAIR, DOCTRINE OF DISCUSSED: *Titus v. Morse*, 63 Am. Dec. 665.

PARTY IS NOT ESTOPPED BY ADMISSION MADE THROUGH INNOCENT MISTAKE OF FACTS: *Thrall v. Lathrop*, 73 Am. Dec. 306.

AGREEMENT BY MISTAKE UPON ERRONEOUS LINE AS BOUNDARY will not operate as an estoppel upon the parties: *McAferly v. Conover*, 70 Am. Dec. 57, and cases collected in note 61.

TOLEDO ETC. R. R. Co. v. HARMON.

[47 ILLINOIS, 298.]

VERDICT WILL NOT BE DISTURBED, unless it is manifestly against the weight of the evidence.

RAILROAD COMPANIES WILL BE HELD TO EXERCISE OF INCREASED CARE and diligence, commensurate with the greater hazard, in operating their franchises in populous cities and over public thoroughfares.

GREAT OBJECT OF GOVERNMENT IS TO PROTECT LIFE, LIBERTY, AND PROPERTY of the citizen, and in the pursuit of that object all interests should be protected, and no one branch of business or interest be permitted to injure or destroy others.

RAILROAD COMPANY WILL BE LIABLE, where its employee performs an act incident to his employment, so unskillfully, negligently, recklessly, or wantonly that persons whose fault does not contribute are thereby injured; and the company is not released from liability by the fact that the wrongful acts were in violation of rules or by-laws, or against particular instructions of the company.

ACTION in case, brought to recover for injuries sustained by the plaintiff in crossing the defendant's railroad track, by the running away of his team, which became frightened at the noise caused by letting off steam from an engine operated by an employee of the defendant. Other material facts appear in the opinion. Verdict for the plaintiff, and the defendant's motion for a new trial was overruled. The defendant appealed.

Robertson and Barnes, and Ketcham and Atkins, for the appellant.

Morrison and Epler, for the appellee.

By Court, WALKER, J. The evidence in this record is conflicting, and was properly left to the consideration of the jury. In such cases this court will not disturb the verdict, unless we can see that it is manifestly against its weight. An attentive examination of the testimony fails to satisfy us that the finding is unwarranted. On the contrary, we think it preponderates in favor of the finding of the jury. If the agents and employees of a railroad company, while in the discharge of their duty, act with such negligence as to occasion injury to others who are not in fault, the company must be held liable in damages for the wrong. The well-being of society requires these bodies to employ careful and skillful agents, and that they in the performance of their duties shall have due regard to the safety and rights of other persons. They are held to a high degree of caution and skill while exercising and enjoying their franchises. Negligence or want of skill by their agents, producing injury, will create liability. And when they locate their stations and depots in populous cities and on thoroughfares, they must, for the protection of community, be held to a degree of care commensurate with the greater danger such a situation involves. When located at such places, they know the hazard that must ensue, and must be held to an increased degree of care and diligence equal to the greater hazard. The life and property of individuals cannot be lightly or wantonly placed in jeopardy. If that might be done, then these great instruments of prosperity, and agents in the development of the resources of the country, and promoters of its commerce, instead of a blessing, would become a nuisance, if not a curse, to our citizens. If the lives of men, or their property, must be endangered in the pursuit of their ordinary and legitimate business, while lawfully passing over our public highways, and no person can be held responsible, then it would be an injury instead of a blessing to community that they were constructed.

The great object of government is to afford protection to the life, liberty, and property of the citizen, and in the pursuit of that object all interests should be protected, and no one branch of business or interest be permitted to injure or destroy others. Although not equally beneficial to community, the least pro-

ductive interest or pursuit is nevertheless important as contributing to the prosperity of the whole community. And to the person engaged in such a pursuit, it is as important as the vast enterprises of the more favored of his fellow-citizens are to them, and he is, under the law, entitled to an equal degree of protection in its pursuit and enjoyment. And the purpose of creating government would be perverted if the great and profitable pursuits were permitted to disregard and trample upon the more humble and less lucrative occupations and callings. And however important and even essential these great creations of modern civilization and enterprise may be to society, they must be required to regard the rights of others to the same extent that individuals are held to avoid injury and wrong to them and to each other.

Appellee had the undoubted legal right to travel this public highway in the pursuit of his business, pleasure, or even from caprice, and appellants had no right by their agents to unnecessarily hinder, obstruct, or endanger him or his property, while thus exercising his rights. Both parties have the right to pass and repass over the roads in the modes adapted to their construction; and each is under equal and reciprocal obligations to observe the rights of the other; and neither can willfully, wantonly, or negligently endanger, obstruct, or delay the other in the enjoyment of his rights without incurring liability for the injury; and each party, in the exercise of his right, must observe the highest degree of prudence, circumspection, and skill to avoid the infliction of injury to others.

In this case, there is nothing disclosed by the evidence from which it can be inferred that appellee did not take every precaution which prudence could dictate, to avoid injury. He checked up his team before reaching the road-crossing, and awaited, not only the passage of the engine, but until it came to rest before he attempted to cross. He says that while thus waiting, the engine-driver looked at him as he passed. And this he must have done, if he was not reckless of his duty; and if he did see that he was waiting to cross the track, he was bound to afford all reasonable facilities for the purpose. And having the control of his locomotive, and the steam by which it was propelled, he was required to so use and control them as to avoid injury to others, acting with prudence and caution. He had no right, after he saw appellee start to cross the track, to then put his engine in motion, and run it against appellee's wagon and team, nor had he the right to so use the

steam from his engine as to frighten appellee's horses. He saw that they were restive, and afraid of his locomotive, and must have known that the escape of steam would most probably produce the result that ensued; and it was his duty to have prevented its escape, and avoided the disastrous results that followed from the noise of the escaping steam, which is highly calculated, as all observation teaches, to alarm cattle and horses. Knowing this, he should have been on his guard, and used all necessary precautions to prevent injury.

It can make no difference in its results to appellee whether the escape of steam was the effect of negligence or from wanton and willful purpose. The engine-driver does not pretend that there was any necessity, nor can we imagine any, for the escape of steam at that time. He had stopped his locomotive, and there could be no necessity to start it until appellee had crossed the track, which could have required, at most, not more than a very few seconds. There could have been no danger of an explosion, nor is it pretended there was. Then why the necessity for the escape of steam, either through the whistle or the escape-pipes? It must have been the result of gross negligence under the circumstances, or of wanton and willful purpose, in total disregard of the security of the life and property of appellee.

It is, however, contended that if the engine-driver did the act wantonly or willfully, it was outside of his authority, and hence the company are not liable for the damages resulting from the misconduct of the engineer. He was their servant, was engaged in the performance of the duty assigned to him, and if, while so engaged, he used the engine put into his possession, and under his control, to accomplish the wanton or willful act complained of, why should not the company be held liable? It is said that he was not employed for the purpose, nor directed to perform the act; and it is equally true that they do not employ engineers to inflict injuries through negligence or incompetency, and yet these bodies are held liable for such acts of their servants.

In the case of *Chicago, Burlington, and Quincy R. R. Co. v. Parks*, 18 Ill. 460 [68 Am. Dec. 562], it was urged that the conductor, in ejecting Parks from the train, did not only an unlawful but an unauthorized act, and the company were not liable for damages. The law prohibited him from removing or forcibly ejecting a passenger for refusing to pay his fare, except at a usual stopping-place, while he put him off by force

at a different place. In that case, the agent of the road did an act prohibited by the statute, and outside of his authority, and yet the company were held liable. In the case of *Illinois Central R. R. Co. v. Reedy*, 17 Id. 582, it was said that while trespass might be maintained against the agents of the company for their immediate acts, yet the corporation who employed them would be liable in case for the damage inflicted by their servants; and if authority by the company to perform the act were to be made the test of liability, they would always escape, as they would never authorize their agents to do an unlawful act, or to omit any duty, or to carelessly or negligently perform others, whereby injury would result to individuals.

This court held, in the case of *St. Louis, Alton, and Chicago R. R. Co. v. Dalby*, 19 Ill. 353, that a railroad corporation is liable in an action of trespass for an assault and battery committed by an employee of the company on a passenger on the train; and this rule was fully approved in the case of *Ill. Cent. R. R. Co. v. Read*, 37 Id. 484. It was there said, in answer to the objection to the want of authority in the agent to commit the act, or that the company had no power to order a lawful act to be done in an improper mode, or so that it will violate the rights of others, and therefore such act must be regarded as that of the agent, and not of the company; that such a rule would release railway companies from liability from all affirmative acts violating the rights of others; that in all such cases the ready answer would be that because such act was wrongful, therefore it was unlawful, and not authorized by its charter, but the individual act of their agents, who exercise its functions; that the result of the position would be that the company could not be liable for a trespass because no corporation can be empowered to commit a wrongful act.

There can be no pretense that where an agent commits an act willfully or otherwise, while he is not engaged in the performance of his duty to the company, they would be liable for the wrong; or even while so engaged, if he were to personally perform an act not connected with the business of the corporation, they would be liable. But when employed in the discharge of his duty, or while engaged in operating their engines and machinery on their road, if he uses such agencies in an unskillful manner, or so negligently as to occasion injury to another, or even if, while so engaged, he willfully perverts

such agencies to the purpose of wanton mischief and injury, the company should respond in damages. They should not be permitted to say, It is true he was an agent, was authorized by us to have the possession of our engines, was engaged in carrying on our business, and while so engaged he willfully perverted the instruments which we placed in his hands to something more than we designed or authorized, and therefore we should not be liable for the injury thus inflicted.

In this case, so far as the record discloses, the engineer was properly engaged in the use of the machinery of the company, and it can make no difference whether the escape of steam was negligently permitted or willfully done by the engineer, any more than if he had willfully run his engine against appellee's wagon and team, and thus produced the injury. The question whether it was negligently or intentionally done can, we think, make no difference in results. It then follows that the instructions were not improper, and no error was committed by telling the jury that the company were liable if the act was intentional on the part of the engineer. The judgment of the court below is affirmed.

Judgment affirmed.

WHEN VERDICT WILL BE SET ASIDE AS AGAINST EVIDENCE: *Monroe v. State*, 76 Am. Dec. 58, and note 65; *Daley v. Railroad Co.*, 68 Id. 413; *Morris etc. R. R. Co. v. Ayres*, 80 Id. 215.

VERDICT WILL NOT BE DISTURBED MERELY BECAUSE EVIDENCE IS CONFLICTING: *Keane v. Cannovan*, 82 Am. Dec. 738.

RAILROAD COMPANY IS BOUND TO EXERCISE MORE CAUTION AND HIGHER DEGREE OF CARE when running its cars through a village or city than in the open country: *Beisiegel v. Railroad Co.*, 90 Am. Dec. 741, and cases collected in note 751.

RAILROAD COMPANY IS LIABLE TO SAME EXTENT AS INDIVIDUAL for injury done by servant in the course of his employment: *Holmes v. Wakefield*, 90 Am. Dec. 171, and note 172.

LIABILITY OF RAILROAD COMPANY FOR INJURY CAUSED BY NEGLIGENCE OF ITS SERVANTS: See *Black v. Railroad Co.*, 63 Am. Dec. 586, and cases collected in note 589; *Galena etc. R. R. Co. v. Rae*, 68 Id. 574; *Donaldson v. Mississippi R. R. Co.*, 87 Id. 391, and cases collected in note 399.

EMPLOYER IS NOT ORDINARILY RESPONSIBLE TO THIRD PARTIES FOR WILLFUL WRONG OF SERVANT, even in the course of his employment: *Hagerstown v. Adams Express Co.*, 84 Am. Dec. 499.

THE PRINCIPAL CASE IS CITED to the point that where the servants of a railroad company, while in the discharge of their duties, pervert the appliances of the company to wanton and malicious purposes to the injury of others, the company is liable for such injuries, in *Chicago etc. R. R. Co. v. Dickson*, 63 Ill. 152; and is cited in support of the rule that when a servant

of a railroad company is engaged in the performance of his duty to the company, and about its business, the company will be held responsible for his acts, although he may not have been free from fault on his part, and may have acted beyond his duty, in *Chicago etc. R. R. Co. v. Sykes*, 96 Id. 176.

ENSMINGER v. PEOPLE.

[47 ILLINOIS, 231.]

PROCEEDING BY QUO WARRANTO IS CIVIL IN CHARACTER, and a party applying for a change of venue in such proceeding, showing all the requisite facts thereto, is entitled to a change of venue as a matter of right. The Illinois act of 1861, giving the court discretionary power to grant a change of venue in certain criminal proceedings, does not embrace a proceeding by *quo warranto*.

TITLE OF RIPARIAN OWNER OF LAND IN ILLINOIS BOUNDED by the Ohio River extends at least to low-water mark.

RIPARIAN OWNER WHOSE LINE EXTENDS TO LOW-WATER MARK HAS RIGHT TO EXCLUSIVE USE of the bank to such mark, and may establish a private wharf thereon, and charge what is reasonable for its use by those navigating the river.

PROPERTY OF RIPARIAN OWNER IN BED OF RIVER TO FILUM AQUÆ IS SUBJECT TO PUBLIC SERVITUDE as a highway for the purposes of navigation, but the banks are not subject to that servitude, unless so made subservient by agreement, prescription, or grant.

PROCEEDING in the nature of a *quo warranto*. The opinion states the case.

William J. Allen, and Green and Gilbert, for the appellant.

John F. McCartney, H. K. S. O'Melveny, D. T. Linegar, and Louis Houck, for the appellees.

By Court, WALKER, J. This was a proceeding in the nature of a *quo warranto*, instituted in the circuit court of Alexander County, requiring appellee to show by what authority he collects tolls and tonage duties of and controls the anchoring of vessels lying in the harbor of the city of Cairo. Appellant pleaded four several pleas: first, denying that he did exercise the office of wharf-master, nor did he use and enjoy the liberties, privileges, and franchises in the manner and form as laid to his charge, and concludes to the country; by the second, that Edward Parsons and Samuel Staats Taylor, trustees of the Cairo City property, were the owners of the fee of certain property bordering on the Ohio River, and being the shore of the river to low-water mark at the city of Cairo, and of the wharf or landing-place for vessels, and that it had been and was a private wharf, and that as such they were

entitled to charge the navigators of the river reasonable compensation for using the wharf in loading and unloading vessels; that the trustees, as owners and proprietors, gave public notice of the rates of charges for the use of the wharf, and appointed appellant their wharf-master to collect the charges and take care of the wharf; and that as such private wharf-master he collected the charges of vessels landing at the wharf in Cairo.

The third plea avers that certain persons were the owners in fee of a body of land extending to and bordering upon the Ohio River, and as such laid off and platted the same in November, 1853, into lots and blocks of the city of Cairo, which was duly acknowledged and recorded; that in 1866, the plat of an addition to the city of Cairo was made by the owners in fee of another portion of the land. It avers that the present trustees derive title from the original proprietors, and that in no sale or conveyance have they, or those from whom they derive title, ever parted with the title to the strip of land lying between Levee Street and the Ohio River, upon which this wharf has been established, and that they are the owners in fee of the wharf and the ground upon which it is maintained. The plea then avers the establishment of the wharf and rates of charges, and the appointment of appellant wharf-master, as in the second plea, but more in detail and at large.

The fourth plea avers that Parsons and Taylor are the owners in fee of a strip of land between Levee Street and the Ohio River, and that it was expressly reserved in laying out and platting the city of Cairo, and that the fees and charges have been collected as stated in the second and third pleas.

Appellees filed a demurrer to the second, third, and fourth pleas, which was overruled. And appellees thereupon filed a number of replications. By the first it is averred that Levee Street is a public highway, laid out upon the top of the bank of the Ohio River, and the high-water line of the river is the outer edge of the street, and this street extends along the entire length of the harbor.

The second replication to these pleas avers that the entire wharf is occupied by wharf and coal boats, the owners of which pay rent to Taylor and Parsons, so that vessels cannot land against the land of the wharf, and that appellant collected charges for landing against the wharf-boats, and at places on the wharf where no improvement has been made.

The third replication avers that appellant had intruded into the public harbor of the city, and collected tolls; the fourth, that the land between high and low water mark in the city of Cairo had been dedicated by the United States government, and by those under whom Taylor and Parsons claim, to the public from time immemorial; the fifth, that appellant passes out beyond the water-line of the Ohio River, and controls the mooring and anchoring of vessels that do not touch the land between high and low water mark, nor receive freight from the strip between those points; sixth, that Taylor and Parsons have no title to the land between high and low water mark, where this wharf is maintained. A demurrer was filed to these replications, but was overruled, the court below holding that they constituted a sufficient answer to the pleas of appellant. Failing to further plead, the court rendered a final judgment restraining him from intermeddling with the offices, privileges, and franchises alleged against him in the information. From that judgment an appeal is prosecuted to this court, and we are asked to reverse the same.

The appellant, in the court below, filed an affidavit setting forth grounds for a change of venue, but the court overruled the motion and proceeded to try the cause. It is not denied that the affidavit contains all facts requisite to the allowance of a change of venue, but it is insisted that the proceeding is criminal in its nature, and that under the statute it is a matter of discretion whether the judge shall grant a change of venue in this class of cases. The first section of the statute of 1861, Sess. Laws, 182, declares that when any defendant in any indictment, or information for any offense not punishable by death, in any court in this state, shall apply for a change of venue, the court shall have power to grant or deny the same, after hearing the application. Is this an offense punishable criminally? If so, it falls within this enactment; if not, it is otherwise. We are aware of no decision that has ever held that a proceeding by *quo warranto* is criminal in its nature, much less in form. Anciently, criminal prosecutions were commenced either by an indictment regularly found and presented by a grand jury, or simply on an information drawn up in form, and presented by the king's attorney. But in this country, under modern practice and constitutional restrictions, criminal proceedings are alone had upon an indictment regularly presented by a grand jury. It is, however, true that the modern indictment, being prepared and presented by the

state's attorney to the grand jury, and they, by twelve of their number, having concurred in the indictment thus presented, and having been indorsed by the foreman a true bill, is frequently called a presentment, and is popularly known as such. And it is in this sense that the term "presentment" is used in this statute. It then follows that as this is not a criminal proceeding, the court below erred in refusing to grant a change of venue.

We now come to the question whether the pleas filed by appellant presented a defense to the proceeding. That question involves the consideration whether,—1. The ownership of the land carries the ownership to low-water mark on the river; and if so, 2. Whether the owners have a right to establish and maintain a private wharf between high and low water mark, and make reasonable charges and collect them, for the use of such wharf by vessels navigating the river. These are important questions, the last of which is not altogether free from difficulty. In *Middleton v. Pritchard*, 3 Scam. 510 [38 Am. Dec. 112], it was held and distinctly announced that, under the common law, all lands bounded by a river not navigable, the line of the riparian owner extends to the center thread of the stream. It was also held in that case that the Mississippi River was not, under the rules of the common law, a navigable stream. In this case, however, it is not necessary that the rule should be carried to that extent, as the pleas only claim the fee to low-water mark. But this case, which has been the rule of decision for more than a quarter of a century, clearly establishes the right of these riparian owners to the low-water mark on the river.

It is, however, urged that this case, and those upon which it is based, are not correctly decided, and we are urged to review it, and to settle the rule in the mode desired by appellees. There can be no doubt that when that case was determined, it announced the rule held by the current of authorities of that day, and a careful examination of adjudged cases and elementary writers of the present day show they announce the same rule. There are, however, cases to be found which hold a different rule, and others which question the principles upon which it is based. But we are at a loss to discover any pressing necessity for a court which has once, after full argument and mature consideration, solemnly announced a rule of property, which has been acted upon and acquiesced in for almost a generation, and after rights have been acquired

under it to an immense amount in value, to review the reasons which controlled in announcing the rule, and by overruling it unsettling titles, simply because other courts have arrived at a different conclusion, or have announced some other rule not analogous, or which does not in principle harmonize with the former decision of this court. There is nothing which tends more largely to the harmony of society and the prosperity of communities than certainty and stability of rules by which human acts are to be measured.

If this decision were overruled, it would afford appellees the measure of justice they claim, not under the laws as announced, but upon principles they regard more reasonable; but it would at the same time deprive large numbers of rights in the aggregate amounting to immense sums which they have acquired under, as they supposed, and had every reason to suppose, a solemn assurance of the law that they should be protected in those rights. The promotion of justice, the stability of titles, or the well-being of society, do not require that this decision should be disturbed, whatever might be our views, were the question now before the court for the first time for determination. We therefore decline to review the grounds of that decision, but accept it as the settled law of this state. That case, then, disposes of the first question now under consideration. And it must be held that Taylor and Parsons, if their pleas are true in fact, were the owners, at least to low-water mark; that the grant from the government of adjacent lands to those under whom they claim extended to low-water mark, although, as the state of Kentucky originally owned the fee of the river to that point, it may be in this case that it extended no farther.

The ownership, then, of this strip of ground between high and low water mark being in private individuals, have they the right to establish a private wharf, and make reasonable charges for its use by those navigating the river? It is manifestly the law that these great rivers which traverse our continent are public highways, free to the use of all under reasonable and proper restrictions. All persons have the right to navigate these streams, and in doing so, to land at all proper places for the usual, necessary, and proper purposes under like restrictions. The absolute rights of persons in the use of the stream for the purposes of navigation extend alone to the bed of the river, and not to the appropriation of the soil on its banks, either permanently or temporarily, to their

own use, unless it be in case of peril, when vessels may no doubt land either boat or cargo at any point that safety may require; but whether the owner or master in such a case would be liable to make due and reasonable compensation, it is not now necessary to inquire, as that question is not before us for determination.

The rule was announced in the case of *Ball v. Herbert*, 3 Term Rep. 253, that the public in the enjoyment of the right of using a river as a highway are not allowed to make use of the banks of the stream, under the common law, for the purpose of towing their vessels on the stream. Lord Hale has said that "when private interests are involved, they shall not be infringed without satisfaction being made to the parties injured": See Angell on Watercourses, 3d ed., 207. And in the case of *Ball v. Herbert*, *supra*, Lord Kenyon said: "If satisfaction, then, is necessary, and this satisfaction is not ascertained, there can be no ground which will support a common-law right, and it thus resolves itself into an agreement between the parties, and cannot be considered as a right to use the banks indefinitely." If the public has the absolute right to use the banks as well as the bed of the stream, the banks would be public and not private property, and the riparian owner would have no right to use or enjoy them, and any appropriation of them to his own use by the erection thereon of buildings or other improvements, or by their cultivation, would be a nuisance. And such a rule would operate unjustly, and lead to great confusion and uncertainty as to the extent of the rights of the public and those of the riparian owner.

It then follows that while the property of the riparian owner in the bed of the river to the *flum aquæ* is subservient to the use of the public as a highway, still the banks of the river are not under or subject to that servitude; and to use the banks of the stream, those using them must acquire the right by agreement, prescription, or grant. Nor can the increasing commerce divest well-established and recognized rights of property held by individuals. There is but one mode of appropriating private property to public use, and that is by the exercise of the right of eminent domain, under the limitations and restrictions of the constitution. It is true, no doubt, that the public might acquire the right by prescription, or by dedication, but in this case no such right is claimed. It then follows that owners of the land on a stream have the right,

between high and low water mark, to establish a private wharf, and charge reasonable compensation for its use; but like the use of other property or services, the charges must not be unreasonable or exorbitantly high.

This, then, is the origin of wharfage, or wharf rights. The riparian owner, having the right to the exclusive use of the banks to the low-water mark, the person navigating the river cannot land against the will of the riparian owner, and becomes a trespasser if he does so without his consent; and as vessels, in prosecuting their business, have occasion to land frequently for the purpose of receiving and discharging freight and passengers, it is but reasonable that when the riparian owner shall improve and provide a commodious landing at a convenient place, for the purpose of receiving and discharging passengers and freight, he should receive a reasonable compensation. In the case of *Bainbridge v. Sherlock*, 41 Ind. 41, it was held that the owner of a wharf-boat, lying against the bank of the Ohio River, has the right to charge a reasonable compensation for permitting steamboats to land against such wharf-boat, for the purpose of receiving and discharging their cargo and passengers. The right of dockage and wharfage is, perhaps, coeval with commerce, connected with marine and inland navigation; and in all ages and countries charges have been made for such dockage and wharfage to some person, or body of persons, and the law has recognized the right to make reasonable charges for such aids to commerce.

The judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

BREESE, C. J., took no part in the decision of this cause.

PROCEEDING BY QUO WARRANTO, NATURE OF: *People v. Railroad Co.*, 86 Am. Dec. 64, and note 69; when it may be sustained against corporation: *State v. Bailey*, 79 Id. 405, and note 411.

OWNERSHIP OF SHORE OR LAND BETWEEN HIGH AND LOW TIDE: See *Lorman v. Benson*, 77 Am. Dec. 435, and cases collected in note 443.

RIPARIAN PROPRIETOR IS, IN GENERAL, ENTITLED TO LAND TO MIDDLE OF STREAM: *Rhodes v. Whitehead*, 84 Am. Dec. 631.

LAND FORMED BY GRADUAL AND IMPERCEPTIBLE RESCISSION OF the waters of a lake or river, whether navigable or not, belongs to the riparian owner from whose shore the water has so receded: *Warren v. Chambers*, 91 Am. Dec. 538, and note 541.

THE PRINCIPAL CASE IS CITED to the point that the title of the riparian proprietor upon the Ohio River extends to low-water mark, in *Sherlock v. Bain-*

bridge, 41 Ind. 41; and is cited to the point that no rivers, by the common law, are deemed navigable above the ebb and flow of the tide, and the stream above belongs to the riparian proprietors on each side of it, *ad flum aquæ*, in *City of Chicago v. McGinn*, 51 Ill. 272. It is also cited to the doctrine that riparian owners on the Ohio River have the right to erect and maintain wharves and docks on its banks, between high and low water mark, so they do not obstruct navigation or impair the rights of others; and that the public have no right to land their cargoes on the land of such riparian owner without his consent, and he may charge a reasonable amount for dockage and wharfage, in *City of Chicago v. Laffin*, 49 Id. 176.

LUX v. HOFF.

[47 ILLINOIS, 425.]

IF ESTATE IN FEE BE GRANTED TO HUSBAND AND WIFE, THEY ARE NEITHER JOINT TENANTS NOR TENANTS IN COMMON, BUT BOTH ARE SEISED OF THE ENTIRETY, AND THE WHOLE GOES TO THE SURVIVOR. The Illinois statute of wills does not change this common-law principle.

RESULTING TRUST—MONEY FURNISHED BY WIFE.—Lands were bought with the wife's money, and the conveyance was to the husband and wife by name, and their heirs and assigns forever. There was no evidence of intention on the part of the wife to create a trust. *Held*, that the law would infer that she conferred an interest on her husband, as expressed in the deed, and that no trust would arise by operation of law in favor of herself or her heirs.

BILL in chancery, praying an account with the defendant Hoff, a decree for any balance to which the complainant is entitled thereon, and for a partition of certain lands. The complainant was the son and only surviving heir of Barbara Hoff, deceased, who was formerly the wife of John Lux, the complainant's father. After the death of John Lux she intermarried with the defendant Hoff, and she and her husband purchased, with her money, a tract of land which was conveyed to said Nicholas Hoff and Barbara Hoff, to have and to hold the same, to them, their heirs and assigns, forever. The marriage and purchase were both prior to the married woman's act of 1861. The bill charges that since the death of Barbara, the complainant demanded a portion or division of said lands, which the defendant has always refused, or to make any equitable settlement with the complainant in relation to his mother's estate. The defendant put in a demurrer to the bill, which was sustained, and the bill dismissed, and the complainant appealed.

Thomas G. Allen, for the appellant.

By Court, BREESE, C. J. This case is submitted on the appellant's brief.

The principle has been too long settled to be now contested, that if an estate in fee be granted to a man and his wife, they are neither joint tenants nor tenants in common. The reason is, as husband and wife are but one person in law, they cannot take the estate by moieties, but both are seised of the entirety, so that neither the husband nor the wife can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor: 2 Bla. Com. 182.

This doctrine was fully recognized by this court in *Mariner v. Saunders*, 8 Gilm. 113.

It is the doctrine of the common law: Co. Lit. 575.

Appellant, however, insists that our statute of wills, by the forty-sixth section, changes this rule, and the statute must control.

The same statute was in force when the decision in *Mariner v. Saunders*, *supra*, was made, and it was not then supposed it changed the common-law principle, nor does it. The estate of Mrs. Hoff, whatever it was, could not descend to her heirs, for, by the very deed creating the estate, it survived, on her death, to her husband. It was her estate *sub modo* only. Had Hoff died, it would have become hers absolutely, and on her death descended to her heirs according to section 46. The estate she took, in its inception, was one which, by possibility, might become her husband's. That possibility did occur, and the whole estate is vested in him.

Upon the other point made, it is sufficient to say there is no evidence, from the facts stated and admitted by the demurrer, of an intention to create a trust. Admit the money was furnished by Mrs. Hoff with which the land was bought, she had a clear right to confer an interest in it upon her husband, and such an interest as should, in the event of her death, make him the absolute owner of the whole.

We can perceive no legal or equitable ground on which appellant's claim can be based. The demurrer to the bill was properly sustained, and the decree dismissing the bill must be affirmed, as there is no equity in it.

Decree affirmed.

AT COMMON LAW, GRANT TO HUSBAND AND WIFE VESTS IN THEM ESTATE BY ENTIRETIES, and not by moieties: *Davis v. Clark*, 89 Am. Dec. 471, and cases collected in note 477.

REAL ESTATE PURCHASED WITH WIFE'S EARNINGS DURING COVERTURE BELONGS TO HUSBAND, and is subject to be taken for his debts: *Cramer v. Reford*, 90 Am. Dec. 594.

THE PRINCIPAL CASE IS CITED to the point first stated in the *syllabus*, in *Almond v. Bonnell*, 76 Ill. 540; and is distinguished in *Cooper v. Cooper*, 76 Id. 65, in that the marriage and purchase were before the adoption of the married woman's act of 1861; and see *Harrer v. Walner*, 80 Id. 202; it is also distinguished in *Riggin v. Love*, 72 Id. 556, as being only applicable where the fee is conveyed to the husband and wife jointly.

OHIO ETC. RAILROAD COMPANY v. SHANEFELT.

[47 ILLINOIS, 497.]

RULE THAT ALL PERSONS ARE REQUIRED TO SO USE THEIR OWN as to prevent injuries to others applies to the same extent to railroad companies as it does to private individuals.

IT IS NOT NEGLIGENCE PER SE FOR RAILROAD COMPANY TO PERMIT dry weeds and grass to accumulate on its right of way, but such an accumulation may be evidence from which negligence may be inferred.

OWNER OF LAND CONTIGUOUS TO RAILROAD IS EQUALLY CHARGEABLE with the company for want of care in respect to the dry grass on his own land; and he cannot recover for injuries by fire thus arising, unless it appears that the negligence of the company was greater than his own.

TRESPASS on the case. The facts appear in the opinion.

H. P. Buxton, for the appellants.

Willard and Goodnow, for the appellee.

By Court, WALKER, J. This was an action of trespass on the case, brought by appellee, in the Marion circuit court, against the appellants. The declaration avers that appellee was the owner of one thousand rails and twenty acres of meadow, situated on his farm, of the value of two hundred dollars; that appellants owned and operated a railroad running through the farm; that appellants owned the right of way fifty feet in width on each side of their track; that it was the duty of appellants to keep the right of way free and clear from dry grass, weeds, etc., to prevent fire from communicating from their engines to such dry grass, and thence to the meadow; but that appellants negligently suffered their right of way, adjoining appellee's fence and meadow, to become foul with dry grass, and a locomotive of appellants, whilst in charge of their servants, was run over their track, and fire was communicated therefrom to the dry grass on their right of way, and from the same to the fence and meadow of ap-

pellee, and burned one thousand rails and twenty acres of meadow, appellee's property, and destroyed the same. To this declaration appellants filed a plea of not guilty.

It appeared from the evidence, on the trial, that appellants owned the road running through appellee's farm, and that there was dry grass and weeds on their right of way, and that fire was communicated from a passing engine, operated by the company, on the 28th of August, 1866, to the grass on their right of way, and ran thence into the fence and meadow of appellee; that eight hundred rails were destroyed, and sixteen acres of meadow burnt over; that there was dry grass in the meadow adjoining to the right of way. Appellants introduced evidence from which it appeared that the engine from which the fire was communicated was furnished and properly equipped with the most approved mechanical contrivances known to prevent the escape of fire, which was in good repair.

The case was submitted to the jury without instructions from the court, and they found a verdict in favor of appellee for \$98.40 damages. Appellants entered a motion for a new trial, which was overruled by the court, and a judgment rendered on the verdict; to reverse which, the case is brought, by appeal, to this court, and the overruling of the motion for a new trial is assigned for error.

This record presents the question whether a railroad company, having provided and used the best known contrivances to prevent the escape of fire from their engines, are nevertheless liable for not removing, or preventing the accumulation of, dry grass and weeds on their right of way, to prevent fire from communicating to adjoining lands. In other words, are such bodies bound to cultivate, mow, or otherwise prevent the growth of vegetation on their right of way? Is it *per se* negligence to permit dry grass, and other vegetable matter combustible in its nature, to remain on the side of their track? That such bodies, like individuals, are required by the law to use all reasonable precautions to prevent injuries to others, there can be no question. All persons are required to so use their own as to prevent injury to others; and this rule applies to the same extent, and no further, to corporate bodies as it does to natural persons. It then follows that appellants were bound to use the same degree of effort to prevent injury to others, whilst exercising their franchises and corporate privileges, as an individual is under to other persons.

Again, it is the settled law of this court that negligence is relative; and if both plaintiff and defendant are negligent, a recovery cannot be had, unless the defendant has been guilty of gross negligence, amounting to willful misconduct. If a plaintiff is guilty of such negligence as necessarily contributes to the injury, it must appear that the defendant was guilty of a higher degree of negligence. When the plaintiff, by his own carelessness, has contributed to produce the injury, the defendant is not absolved from all further care and effort, on his part, to avoid the injury, but is still required to use all reasonable efforts to prevent its recurrence; and failing to do so, he must be held liable. But in the very nature of things, it must be that where the plaintiff has by his negligence increased the hazard, it becomes more difficult for the defendant to avoid the injury; and unless it appears that he could have done so, he will not be held liable.

In the case of *Illinois Central R. R. v. Mills*, 42 Ill. 407, it was said that it was not an indispensable conclusion of law that a railway company is guilty of negligence, to be inferred from the fact that fire ignited in dry weeds or grass upon their land, but that it is a question of fact to be determined by the jury, in view of the extent to which the weeds and grass have been permitted to accumulate on their right of way, the season of the year, and all other circumstances affecting the liability to fire. It was also held that the company were bound to use the same diligence in removing such weeds, grass, and other combustible material, from exposure to ignition by the locomotive, that a cautious and prudent man would use in reference to combustible matter upon his own premises, if exposed to the same hazard from fire as dry grass upon the side of the railway.

In that case, as in this, it was contended that it was negligence *per se* to permit dry weeds and grass to accumulate on the right of way of a railway company; that its presence there created a legal presumption of negligence. But it was held to be error to so instruct the jury, and the judgment was reversed for that error. That such an accumulation may be evidence from which negligence may be inferred, is certainly true, under some circumstances; but we are aware of no legal principle which has declared it, of itself, to be negligence. The statute has not required such bodies to remove such a growth, nor has any decision held it to be a legal duty. Such bodies, like individuals, are bound to use reasonable precau-

tions to prevent the escape of fire from their engines and premises; and so are individuals; and the one is under no greater obligation than the other; both are under the same obligation, resulting alone from the rules of the common law, and in each case the question of negligence must depend upon the circumstances which surround it.

In this class of cases both parties are required to use care and diligence to avoid the loss; and it should appear that a plaintiff, suing for a loss from the escape of fire from the engine or railway grounds, has not contributed to the injury by equal neglect of duty. If he has permitted his lands adjoining the right of way of the road to become foul and highly calculated to ignite, this would be evidence from which a jury would be warranted in the inference that he had been guilty of negligence contributing to the injury. We are at a loss to perceive why a railroad company should be required, in the absence of statutory requirement, to mow their right of way, and the adjoining land-owner be permitted to let his lands become foul and liable to ignite; on the contrary, both should be required to use all reasonable efforts to prevent the escape and spread of fire. Where the corporation has adopted, and have in use and in proper repair, the best known mechanical appliances to prevent the escape of fire, and a land-owner is equally negligent in permitting grass and weeds to accumulate on his adjoining land, as the company upon their right of way, no reason is perceived why it should not be held that the land-owner has contributed to the loss.

If adjoining land-owners were to permit such combustible materials to accumulate, and fire was accidentally or unavoidably to get into the field of one, and thence communicate to the other, would any one say that they had not contributed equally to the loss? It would not be contended that one was any more bound to remove the dry grass and weeds from his field than the other. And in such a case each takes the hazard of accidents. Nor are we able to perceive the difference in that and the case at bar. Having provided the best known contrivances, and having employed them, and kept them in good order, the escape of fire is accidental, and where both parties have permitted their adjoining lands to accumulate combustible material, and fire escapes, whether on the right of way or from the field of the owner, we cannot see that the company should be held liable for negligence.

In this case the railroad employed the best known ma-

chinery to prevent the escape of fire, and the evidence shows that it was in good order at the time. It also appears that there was combustible material on the land of appellee, adjoining the right of way of appellants. And as each party was under obligation to use all reasonable precautions to prevent the injury, we do not see that the negligence of appellants was so much greater than that of appellee as to render them liable. Had appellee taken reasonable precautions to guard against the injury, and the company had omitted any duty, such as neglecting to use spark-arresters, or those employed had been in bad condition, then the case would have been different; but in this case, we think the evidence fails to disclose a right of recovery by appellee, and the judgment of the court below must be reversed.

Judgment reversed.

BREESE, C. J., delivered a dissenting opinion, holding that there is but slight, if any, analogy between a railroad company and individuals in the pursuit of their ordinary vocations, and that a much higher degree of care and diligence is, and should be, required of the former than of the latter; and further holding that a railroad company should be required to keep its roadway free and clear of combustible matter, and that it is negligence *per se* to permit such combustible matter to remain, subject to be fired by any passing engine. He thus concludes: "I hold that railway companies shall not only use the most approved spark-arresters, and other proper mechanical contrivances, but, in addition, shall keep their roadway free of combustible matter, and do everything else which ordinary human ingenuity can suggest for the safety of the property of the citizen. Whilst they leave undone anything they might reasonably do to prevent accidents and losses, they should be held responsible for all damages resulting therefrom." The doctrine of the prevailing opinion, that a railroad company is held to no higher duty to keep its right of way free from grass or weeds than are the adjoining land-owners and proprietors to keep the adjoining lands free from grass or weeds, is, however, followed in *Illinois Cent. R. R. Co. v. Frazier*, 47 Ill. 505, citing the principal case. If, therefore, a railroad company has in use and repair the best known mechanical appliances to prevent the escape of fire, and a land-owner is equally negligent in permitting dry grass and weeds to accumulate on his adjoining land as the company is upon its roadway, there can be no recovery by the land-owner for damage caused in consequence of the communication of fire from the grass and weeds on the company's land to the grass and weeds on his own land: *Illinois Cent. R. R. Co. v. Frazier*, 64 Ill. 28; *Illinois Cent. R. R. Co. v. Nunn*, 51 Id. 78; *Chicago etc. R. R. Co. v. Simonson*, 54 Id. 504, all of which cite the principal case. And the same doctrine is reaffirmed in the more recent case of *Chicago etc. R. R. Co. v. Pennell*, 94 Id. 448; see also *Murphy v. Chicago etc. R. R. Co.*, 45 Wis. 222; S. C., 30 Am. Rep. 721. So the doctrine that it is not negligence *per se* in a railroad company to allow grass and weeds to grow and accumulate upon its right of way, in the absence of a statute forbidding it, is affirmed in *Texas etc. R. R. Co. v. Medaris*, 64 Tex. 92; nor is the fact that sparks are permitted to escape from a moving engine negligence *per se*. Id. And according to some recent decis-

ions, the mere fact that, after the passage of a train, dry grass and other combustible matter were discovered burning along the line of a railroad, is not of itself evidence of negligence on the part of the railroad company: *Naftzinger v. Roth*, 93 Pa. St. 449; *Jennings v. Pennsylvania R. R. Co.*, 93 Id. 337. But it is held in Missouri that proof of the sole fact of fire escaping from a passing engine and burning the property of another makes a *prima facie* case of negligence against the company which provides and operates the engine: *Wise v. Joplin R. R. Co.*, 85 Mo. 179; *Redmond v. Railroad Co.*, 76 Id. 550; *Palmer v. Railroad Co.*, 76 Id. 217; but this *prima facie* case of negligence may be rebutted by evidence that the engine from which the fire escaped was properly constructed and equipped, and that it was operated carefully and skillfully by competent employees: *Wise v. Joplin R. R. Co.*, 85 Mo. 178, 187. Proof that the fire originated near the railroad track, and shortly after the passing of a train, and that recently the same engine had been seen to drop glowing cinders and to start other fires, was held sufficient to warrant a finding of negligence on the part of the company, in *Green Bridge R. R. Co. v. Brinkman*, 64 Md. 52; S. C., 54 Am. Rep. 755.

The presence of dry grass and other combustible matter upon the way of a railroad, and permitted by the company to remain there without cause, is a fact from which the jury may find negligence against the company, although it is not negligence *per se*: *Kellogg v. Chicago etc. R. R. Co.*, 26 Wis. 223, 229, citing the principal case; *Flynn v. Railroad Co.*, 40 Cal. 14; *Clarke v. Railroad Co.*, 33 Minn. 359. And according to the weight of authority, it is no defense, in an action against a railroad company for negligently allowing fire to escape from its engine and destroy the plaintiff's property, that the plaintiff allowed grass and stubble to remain on his field adjoining the railroad track. The mere fact that the plaintiff had rubbish on his own land is not such contributory negligence as would defeat his action: *Fitch v. Pacific R. R. Co.*, 45 Mo. 322; *Lester v. Railway Co.*, 60 Id. 265; *Patton v. St. Louis etc. R'y Co.*, 87 Id. 117; S. C., 56 Am. Rep. 446; *Salmon v. Railroad Co.*, 38 N. J. L. 5; S. C., 39 Id. 299; 20 Am. Rep. 356; *Philadelphia etc. R. R. Co. v. Schultz*, 93 Pa. St. 341; *Pittsburgh etc. R. R. Co. v. Hixon*, 79 Ind. 111; *Louisville etc. R. R. Co. v. Richardson*, 66 Id. 43; S. C., 32 Am. Rep. 94; *Pittsburgh etc. R. R. Co. v. Jones*, 86 Ind. 496; S. C., 44 Am. Rep. 334; *Kalbfleisch v. Railroad Co.*, 102 N. Y. 520; S. C., 55 Am. Rep. 832; *Richmond etc. R. R. Co. v. Medley*, 75 Va. 499; S. C., 40 Am. Rep. 734; *Snyder v. Railroad Co.*, 11 W. Va. 14; *Vaughan v. Taff Vale R'y Co.*, 3 Hurl. & N. 743; S. C., 5 Id. 679; *Smith v. Railway Co.*, L. R. 5 C. P. 98; S. C., 6 Id. 14; but compare *Murphy v. Chicago etc. R. R. Co.*, 45 Wis. 222; S. C., 30 Am. Rep. 721.

EXPLANATION AND APPLICATION OF MAXIM, *Sic utere tuo ut alienum non lædas*: *Radcliff v. Mayor etc.*, 53 Am. Dec. 357; *Stinson v. Railroad Co.*, 88 Id. 332.

LIABILITY OF RAILROAD COMPANY FOR FIRES: *Sheldon v. Railroad Co.*, 67 Am. Dec. 155, and note.

RULE AS TO BURDEN OF PROOF, where injury results from fires caused by sparks escaping from locomotive-engine: *Bass v. Railroad Co.*, 81 Am. Dec. 254, and note 259.

THE PRINCIPAL CASE IS CITED and approved to the first two points stated in the *syllabus*, in *Illinois Central R. R. Co. v. Frazier*, 47 Ill. 505; it is cited to the third point stated in the *syllabus*, in *Chicago etc. R. R. Co. v. Simonson*, 54 Id. 506; *Illinois Central R. R. Co. v. Frazier*, *supra*; and to the point that the question of negligence, by reason of leaving dry grass and combustible material upon the right of way of a railroad company, is one of fact, properly left to the jury, in *Illinois Central R. R. Co. v. Nunn*, 51 Ill. 82.

NELSON v. FIRST NATIONAL BANK OF CHICAGO.

[48 ILLINOIS, 36.]

PROMISE BY BANK TO PAY CHECK DRAWN BY PERSON FOR PURCHASE OF CARGO OF CORN communicated to the seller by the purchaser and by the bank, and relied upon by the seller in taking the purchaser's check, sufficiently identifies the check, and will support an action for the breach of a promise to accept.

BANK IS NOT LIABLE ON PROMISE TO PAY CHECK, unless the promise comes to the knowledge of the payee, and he takes the check upon the faith thereof.

PROMISE TO ACCEPT NON-EXISTING BILL OR CHECK TO CONSTITUTE ACCEPTANCE need not describe it by its date and amount and the name of the drawee, as that would be generally impossible; but merely in such a mode that there could be no possible doubt as to the application of the promise to the bill to be drawn; and a description of sufficient certainty could thus be made to apply to a series of bills as well as to one bill, *semble*.

RECOVERY MAY BE HAD IN ACTION FOUNDED UPON BREACH OF PROMISE TO ACCEPT, though it cannot be had upon the bill as an accepted bill for lack of certainty in the promise; and the rights of the parties are equally secure and attainable in the former action.

REMEDY AT LAW BY ACTION FOR BREACH OF PROMISE TO ACCEPT BILL is so complete that a bill in equity will not lie to enforce this liability; but in this case, as no objection was taken to the jurisdiction in chancery, either in the court below or on appeal, and as the case was not one in which a court of chancery for its own protection need refuse to exercise jurisdiction, it was considered upon its merits, and the decree of the lower court dismissing the bill for want of equity was reversed, and the cause remanded.

BILL in equity to compel the appellee to pay certain checks drawn upon it by one Allen, which the appellee, it was alleged, had promised the appellant it would pay, and which the latter took upon the faith of that promise for a cargo of corn sold to Allen. The bill was dismissed in the court below for want of equity.

Miller, Van Arman, and Lewis, and Williams and Thompson, for the appellant.

Beckwith, Ayer, and Kales, for the appellee.

By Court, LAWRENCE, J. This case arises upon the same state of facts set forth in *First National Bank v. Pettit and Smith*, 41 Ill. 492, with one material and controlling difference. In this case, it appears that the promise of the bank to pay the check drawn by Allen in purchase of the cargo of corn was communicated to appellant both by Allen himself and by Hutchinson, one of the bank directors; and appel-

lant's then partner, who sold the corn, testifies he knew Allen was not pecuniarily responsible, and that he took the check solely on the credit given by the promise of the bank to pay. This fact did not appear in the Pettit and Smith case, and we presume did not exist. The question now is, whether, on this new state of facts, the bank must respond upon its promise.

If the appellant had sold his corn as Pettit did, merely on Allen's credit, and without any knowledge that the bank had undertaken to pay his checks, there would be no ground for holding it liable on its promise, and no reason why it should not be permitted to apply all the money coming into its hands in payment of the debt due to itself, rather than to the payment of that due appellant. A promise to Allen to pay his checks, if it had not come to the knowledge of appellant, and been the basis of the sale made by him to Allen, would have created no privity between him and the bank, and as the promise would have been without benefit to the bank, and without injury to the appellant, if unaware it had been made, it would have been absolutely without consideration as between these parties, and therefore not binding. All the cases agree in holding that in order to make a promise of this character binding in favor of a person who has received a bill, the bill must have been taken on the faith of the promise. But where it has been so taken, it is now the settled American law that the promisor must make his promise good.

The rule was originally laid down in the same way in England, in the case of *Phillips v. Van Mierop*, 3 Burr. 1663, which was twice argued and very fully considered by Lord Mansfield and the other judges of the king's bench. It was subsequently shaken by Lord Kenyon, in *Johnson v. Collins*, 1 East, 98, and has since been fully overruled by the court of exchequer, in *Bank of Ireland v. Archer*, 11 Mees. & W. 385. It is held in the last case, and now seems to be the settled law of that country, that a promise to accept a non-existing bill is not binding as an acceptance, even where the bill is discounted for the drawer upon the faith of such promise. The court, however, express no opinion as to whether an action would lie for a breach of the promise to accept, although they refer to Beawes's *Lex Mercatoria*, page 466, as laying down the rule that a promise to accept is a contract for the breach of which an action will lie, but is not an actual acceptance.

In this country, the leading case is *Coolidge v. Payson*, 2 Wheat. 66, in which Chief Justice Marshall, after reviewing

the English cases up to that date, lays down the rule, "that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." This rule has been constantly followed by the courts of this country, the only point of dispute being as to the degree of accuracy with which the promise to accept must describe the non-existing bill, and it is objected in the present case by counsel for appellee that the promise to pay by the bank did not sufficiently identify the checks to which the promise was to be applied; and the case of *Boyce v. Edwards*, 4 Pet. 122, is cited as an authority in point. The authority of that case is certainly to the effect that the promise of the bank cannot be treated as a technical acceptance, for want of identification of the checks. We may be permitted to say, however, that the difference between a promise to accept a particular bill or check to be thereafter drawn, and a promise to accept all checks which a person might draw for a specific purpose, is so extremely technical and refined that we should be inclined, where the plaintiff had received the check or bill upon the faith of the promise, and had sued on the promise as an acceptance, to hold with the supreme court of Michigan, in *Bissell v. Lewis*, 4 Mich. 450, that it was a distinction without a difference. It seems to us a fair construction of the language of Chief Justice Marshall would require, not that the promise should describe the bill to be drawn and accepted by its date and amount, and the name of the drawee, as that would be generally impossible, but merely in such a mode that there could be no possible doubt as to the application of the promise to the bill to be drawn. A description of sufficient certainty could thus be made to apply to a series of bills as well as to one bill. In the present case, for example, there can be no difficulty in applying the promise of the bank to the check under consideration. Indeed, in this very case of *Boyce v. Edwards*, *supra*, the court, while giving so technical a construction to the language of Chief Justice Marshall, say the reason of the rule is, "that the party who takes the bill upon the credit of such authority may not be mistaken in its application." If that be the reason of the rule, it would seem that any description should be held sufficiently certain which would leave no doubt that a particular bill, or series of

bills, was intended by the promise, and had been negotiated upon its faith.

The question, however, whether the promise in this case can be considered a technical acceptance, we do not propose to decide, and it is indeed of no practical importance, for in this same case of *Boyce v. Edwards*, *supra*, on which counsel for appellant rely as showing the promise not to be an actual acceptance, it is held that, though a recovery cannot be had upon the bill as an accepted bill, it may be had in an action founded upon a breach of the promise to accept. In an action of the latter character, the court say: "The evidence may be of a more general character, and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise." The court further say: "As respects the rights and the remedy of the immediate parties to the promise to accept, and all others who may take bills upon the credit of such promise, they are equally secure and equally attainable by an action for the breach of the promise to accept, as they could be by an action on the bill itself." That a recovery may be had in an action of the character above indicated, is also held in *Cassell v. Dows*, 1 Blatchf. 335; *Russell v. Wiggins*, 2 Story, 213; *Lonsdale v. Lafayette Bank*, 18 Ohio, 126; *Bissell v. Lewis*, 4 Mich. 450. See also *Stone v. Logan*, 9 Mass. 55; *Carnegie v. Morrison*, 2 Met. 406; *Goodrich v. Gordon*, 15 Johns. 6; *Schimmelpennich v. Bayard*, 1 Pet. 264.

That the promise of the bank in this case so far identified the checks to which it was to be applied as to enable the appellant to maintain an action for its breach, is settled by the foregoing authorities, and by others which might be cited.

It is also objected by counsel for appellee that this promise should have been in writing. It is the settled law, and has been twice decided by this court, that a parol promise to accept an existing bill is valid: *Jones v. Council Bluffs Bank*, 34 Ill. 319; *Mason v. Dousay*, 35 Id. 424. If a verbal promise to accept an existing though non-present check is binding, we are wholly unable to discover any reason why it should not be equally so as to a non-existing bill, under the authority of the American cases, in none of which is any distinction made between parol and written promises of this character, except where a written promise is expressly required by statute. A parol promise to accept or pay a non-existing bill is no more within our statute of frauds than would be a similar promise

to pay an existing bill, and clearly neither is within the statute, for such a promise, as stated by Mr. Justice Story in *Townsend v. Sumrall*, 2 Pet. 182, "is an original promise to the purchaser, not merely a promise for the debt of another." Such a promise gains no additional validity or obligation from being in writing. It is merely susceptible of clearer proof. If in writing, it is binding as to non-existing bills only where the bill is received upon its faith, and when this takes place it has neither less legal nor moral obligation because made in parol. The very question arose in the case just cited from 2 Peters, and the first point made in that case by counsel for the plaintiff in error was, "that a parol promise to accept a non-existing bill does not constitute a contract for the breach of which an action may be maintained." The court, however, held the parol promise to be valid.

This is a proceeding in chancery, and the remedy at law is so complete that we see no ground why an objection to the jurisdiction, if taken in the court below, would not have been sustained. But none was taken by the pleadings, and none has been raised here in the argument. The case has been argued upon its merits, and we presume it is the wish of the parties to have it decided upon that ground, and an end put to the litigation. As no objection has been raised to the jurisdiction, and as the case is not one in which a court of chancery, for its own protection, need refuse to exercise jurisdiction, we reverse the decree of the superior court dismissing the bill for want of equity, and remand the cause.

Decree reversed.

SYNOPSIS OF FIRST NATIONAL BANK v. PETTIT AND SMITH, 41 ILL. 492. — This was an action of *assumpsit* by Pettit and Smith against the First National Bank of Chicago, to recover the amount of a check drawn upon the bank in favor of the plaintiffs by Allen, and, like the principal case, was based upon the promise of the bank to pay that, or rather similar checks, but differed from it in the lack of privity between the payees and the bank; that is, it did not appear that they were informed by the bank of its promise to pay the check, or knew of it, or that they took the check upon the faith of that promise. The arrangement of Allen with the bank was the same as that involved in the principal case; that is, on the 14th of June, 1865, the bank agreed with Allen to pay his checks to the value of a cargo of corn, which he was about to purchase, and which was to amount to between eight thousand and nine thousand dollars in value. And Allen was to buy the corn as a broker upon the order of Charles J. Mann, of Buffalo, upon whom he was to draw his draft in favor of the bank for the amount of its advances, and the bank was to receive and hold the bill of lading as security for the payment thereof. At the close of banking hours on the 15th of June, 1865,

and when Pettit and Smith presented their check for payment, the bank had paid Allen's checks to an amount exceeding ten thousand dollars. The check was drawn by Allen in favor of Pettit and Smith for the amount of \$998.86, and was given for corn bought of them toward the cargo. The bank refused payment, and this suit was then commenced. It also appeared that among the checks drawn by Allen, and paid by the bank, was one in favor of Adams & Co. for \$5,936.74, dated the 13th of June, which was not given for corn, but was not presented until the 14th of June, after Allen had made his arrangement with the bank. Judgment was rendered in favor of the plaintiffs, and the defendants appealed. In delivering the opinion of the court, Lawrence, J., said: "It is said the bank had not the right to pay the check of Adams & Co., from the payment of which the deficit arose. But the fallacy of the argument consists in the assumption that this arrangement was effected with the bank by Allen as agent merely of Mann, and upon the credit of the latter; and that the case is to be treated as if Mann had made a special deposit, through the agency of Allen, to his own credit, to be checked out for the purchase of corn, and for that only. But in fact, there was no privity whatever between the bank and Mann. The money was not advanced upon his credit, as suggested by appellees' counsel, but on the credit of the corn itself, for which the bank was to hold the bill of lading. Mann stood to them as a mere name, upon which a draft was to be drawn, and when it should be paid, the bank would surrender the corn. Any other grain dealer in Buffalo would, no doubt, have answered the purpose of the bank quite as well. The credit established by Allen with the bank was merely a personal credit to the benefit of his general account as a depositor; and although the bank might not have been obliged to pay any check that was not drawn toward the purchase of the cargo of corn, it clearly had the right to pay any of Allen's checks drawn by him in good faith, and not with a view of defrauding others. And that there was any intent to defraud anybody, either on the part of Allen or the bank, is not pretended. If other persons thought proper to sell him corn and take payment in his checks, they did it on his credit merely, and not upon any promise by the bank to pay his checks. It is not claimed that any communication took place between the appellees and the bank until they presented their check for payment, and Allen's credit was already overdrawn. It is not pretended that the bank had ever promised them to pay Allen's checks. . . . The case is simply this: Allen gets a credit with the bank, upon a promise to deliver to it a cargo of corn that he proposes to buy, of nine thousand dollars. The bank pays his checks until his account, including this credit, is overdrawn, and refuses to pay further. We cannot see why it should. It receives the bill of lading for the corn according to agreement, and a draft drawn against it, and from the proceeds reimburses its advances. We do not see why it should not be permitted to do so, or upon what principle it should be required first to pay a debt due from Allen to persons with whom it has had no transactions, and who, if losers, are so by no fault of the bank. The debt due from Allen to it is as meritorious as that due the appellees, and there is no reason why the bank should be required to surrender its securities or their proceeds. The judgment must be reversed, and the cause remanded."

PROMISE TO ACCEPT NON-EXISTENT BILL OF EXCHANGE, WHEN EQUIVALENT TO ACCEPTANCE: See *Steman, Baker, & Co. v. Harrison*, 82 Am. Dec. 491, and cases cited in the note 492, 493; *Kennedy v. Geddes*, 33 Id. 289; *Van Phul v. Sloan*, 38 Id. 207; *Davidson v. Keyes*, 38 Id. 209.

HAPGOOD v. CORNWELL.

[48 ILLINOIS, 64.]

FIRM CREDITORS HAVE NO SUPERIOR EQUITY TO THAT OF INDIVIDUAL CREDITORS for payment from the partnership assets. Members of the partnership have a superior lien on the partnership property for the payment of the firm debts, and the law allows the creditors to avail themselves of this lien, to the exclusion of individual creditors, where it has not been surrendered by the partners; but it is the equitable lien of the partners that is worked out for the benefit of creditors, and not a lien inhering in the creditors themselves.

ALL MEMBERS OF FIRM MAY AGREE TO APPROPRIATION OF FIRM PROPERTY in payment of an individual debt of one of the partners, and his creditor takes the property discharged of any claim or equity of the partnership creditors, since the members of the firm have expressly parted with their lien, and the firm creditors have none except through the partners.

PARTNER PURCHASING ENTIRE INTEREST OF COPARTNERS MAY USE FIRM PROPERTY in payment of his individual debt, and his creditor will take it discharged of any claim or equity of the firm creditors. Nor will it invalidate the transaction that the purchase is made with the express intention of turning over the goods to the creditor of the purchasing partner.

INDIVIDUAL CREDITOR IS GUILTY OF NO FRAUD IN REQUESTING HIS DEBTOR to procure the consent of his copartners, either by purchase or otherwise, to a surrender of partnership property in payment of the individual debt.

INDIVIDUAL CREDITOR WHO TAKES FIRM PROPERTY IN PAYMENT OF DEBT and for an additional valuable consideration paid, after his debtor has purchased the interest of his copartners, and without notice of an agreement by the purchasing partner with his copartners to pay firm debts, is a purchaser for a valuable consideration without notice, and cannot be required to surrender the goods to the firm creditors or to account for their proceeds.

BILL in equity. The opinion states the case.

George Payson, for the appellants.

Jones and Gardner, for the appellees.

By Court, LAWRENCE, J. Amory Bigelow, Gilbert F. Bigelow, and David Burr were partners in business in Chicago. Hapgood, the appellant, as trustee for Amory Bigelow's wife, had loaned to him a considerable sum of money, which had come to her from her grandfather. Fearing that the money was in peril, he urged Bigelow to secure it, and suggested to him to buy out his partners, and turn over to him the stock. Bigelow did this, whereupon the appellees, who were creditors of the firm, and had obtained a judgment, brought a bill in

chancery against Hapgood and the members of the firm, and the court decreed the payment of their judgment by Hapgood. From this decree he appealed.

The first question in this case is, Was Hapgood practicing a fraud or a wrong upon the creditors of the firm by suggesting that Amory Bigelow should buy the interest of his partners, and secure the debt to him with the firm assets? It would undoubtedly have been a wrong if the law recognized the firm creditors as having a superior equity to that of individual creditors for payment from the partnership assets. But it does not. It recognizes the members of the partnership as having a superior lien on the partnership property for the payment of the firm debts, and allows the creditors to avail themselves of this lien to the exclusion of individual creditors, where it has not been surrendered by the partners. But it is the equitable lien of the partners that is worked out for the benefit of the creditors, and not a lien inhering in the creditors themselves. Thus, if all the members of a firm agree to the appropriation of firm property in payment of an individual debt, due from one of the members, the creditor would take the property discharged of any claim or equity of the partnership creditors, and this because the members of the firm have expressly parted with their lien, and the creditors have none except through the partners. The same result follows from a sale to one partner by the others. The purchasing partner may use the goods in payment of the partnership, or of his individual debts, as he may prefer; and it cannot invalidate the transaction that the purchase is made with the express intention of turning over the goods to the creditor of the purchasing partner. If that can be done directly with the consent of all the partners, it can certainly be done through the indirect medium of a sale to one of them. It also necessarily follows, if the law holds such a transaction legal, and acknowledges no inherent claim to priority on the part of firm creditors, that an individual creditor is guilty of neither wrong nor fraud in requesting his debtor to procure the consent of his copartners, either by purchase or otherwise, to a surrender of partnership property in payment of the individual debt. These principles were fully recognized by this court in *Ladd v. Griswold*, 4 Gilm. 36 [46 Am. Dec. 443], and are the settled law. The partners are the owners of the goods, free from any lien on the part of their creditors, and if they choose to let one member use them in payment of his individual debt, they

have a legal right to do so; and the individual creditor has a legal right to receive payment in that mode.

It is, however, urged, in behalf of appellees, that in the case at bar Amory Bigelow, when he purchased from his partners, agreed with them to pay the partnership debts, and that they thereby retained their lien on the partnership effects for the payment of partnership debts. The proof is, that Bigelow, when he purchased, refused to assume the debts, but promised to do the best he could with the assets; and did, in fact, settle by compounding with a part of the firm creditors. What would have been the effect of this promise of Bigelow if Hapgood had been cognizant of it, we do not find it necessary to decide. In *Rankin v. Jones*, 2 Jones Eq. 169, it is held that a promise by the purchasing partner to pay the firm debts creates only a personal obligation, and not a lien, and does not prevent such partner from using the goods in payment of his individual debts: See also *Ex parte Ruffin*, 6 Ves. Jr. 119. In *Wildes v. Chapman*, 4 Edw. Ch. 669, cited by counsel for appellees, the property was assigned by one partner to the other expressly in trust to pay the partnership debts; and it was held this trust could be enforced by the partnership creditors, as it clearly could, but certainly only against persons taking the property with notice of the trust.

In the case at bar, Hapgood did not merely take the goods in satisfaction of the debt due to him, but he gave his notes for over ten thousand dollars, which were negotiated by Amory Bigelow, and both he and Bigelow testify he had no notice of any undertaking on the part of Bigelow, when he bought from his partners, to pay the debts, if such was the understanding. We see, then, no ground on which Hapgood can be required to surrender these goods to the creditors of the firm, or to account for their proceeds. He stands in the position of a purchaser for a valuable consideration, and without notice of any facts which would raise a superior equity on the part of the appellees. So far as this record discloses, he dealt with Amory Bigelow simply as the purchaser from his copartners, without any agreement to apply the goods in payment of the firm debts. So far as he knew, Bigelow had become the sole owner of the goods, unencumbered by any trust, and Hapgood had the right to buy the goods from him, or take them in payment of a debt.

It is true, the case has at first sight a bad complexion, from the fact that Amory Bigelow, in turning out these goods to

Hapgood, was paying a debt to the trustee of his own wife; but this should not prevent us from dispassionately weighing the actual facts, independently of this relationship. The fact that Bigelow's wife might be benefited did not impair his right to pay or secure the debt due to her trustee. It is not pretended the debt was not honestly due, and when the entire transaction is sifted, we only find that Amory Bigelow bought the interest of his partners in the partnership assets, and then appropriated them to the payment of his individual debt. This he had the right to do, and the fact that he bought the goods with this intent, and that Hapgood was cognizant of it, did not render the transaction illegal, or preserve the lien of the retiring partners upon the partnership effects, for the payment of partnership debts.

Decree reversed.

RESPECTIVE LIENS AND PRIORITIES OF PARTNERSHIP AND INDIVIDUAL CREDITORS: See *Bullock v. Hubbard*, 83 Am. Dec. 130, and cases cited in the note 131; *Crooker v. Crooker*, 83 Id. 509, and note 513; *Willis v. Freeman*, 82 Id. 619, and note 621. Strictly speaking, partnership creditors have no lien upon the partnership effects: *White v. Parish*, 73 Id. 204, and note 206; *Tillinghast v. Champlin*, 67 Id. 510. It is the members of the partnership who have a lien upon the firm property, to have it first applied to the payment of the firm debts: *Arnold v. Wainwright*, 80 Id. 448, and note 455. And the equity of the firm creditors to have partnership property so applied is to be worked out through the partners: *Backus v. Murphy*, 80 Id. 531, and note 533. See *Mittnacht v. Smith*, 88 Id. 233. Therefore, the assumption by the firm of the individual debt of one of the partners is no fraud upon the firm creditors: *Siegel v. Chidsey*, 70 Id. 124. And the *bona fide* sale to one partner by the others of the partnership property transfers the whole property to the purchasing partner, free from the claims of partnership creditors: *White v. Parish*, 73 Id. 204, and note 206. Though, if the purchasing partner agrees to pay the firm debts, then the firm creditors may have rights against third persons with notice: *Conroy v. Woods*, 73 Id. 605. See *White v. Parish*, *supra*; *Miller v. Estill*, 67 Id. 305.

HAHNEMANNIAN LIFE INS. CO. v. BEEBE.

[48 ILLINOIS, 87.]

DOMESTIC CORPORATION MAY MAINTAIN ACTION FOR LIBEL; but *quære*, whether the comity by which a foreign corporation is permitted to bring suit upon its contracts should be so far extended as to permit a suit for libel.

IT IS AGAINST PUBLIC POLICY TO TREAT AS LIBELOUS UPON INSURANCE CORPORATION an article which merely assumes that the corporation proposes to do for its own advantage, or that of its stockholders, whatever its charter may expressly authorize it to do. A free criticism of

the charter of an insurance company, or of any other corporation which claims the confidence of the public, and seeks the possession of its funds, is to be encouraged rather than repressed, as a means of public security.

WHERE INSURANCE COMPANY HAS PROCURED CHARTER WHICH AUTHORIZES it to pay an interest of thirty per cent per annum to its stockholders before laying by a fund for the security of its policy-holders, a publication is not libelous merely because it assumes that the company will do, for the profit of its stockholders, that which it has obtained an express power to do; and because it argues that a company, organized under such a charter, must necessarily be unworthy of public confidence.

PUBLICATION MAY BE LIBELOUS UPON CORPORATION IF ITS CHARTER CONTAINS NO AUTHORITY to do what is made the subject of criticism, and the company does not propose to do its business in that manner.

FOREIGN CORPORATION SUING FOR LIBEL SHOULD SET OUT ITS CHARTER AT LENGTH in the declaration, so that the court may determine whether the alleged libelous publication was false in stating the mode in which it authorized the business of the company to be done; and an omission to do so is fatal. Nor can the charter be treated as properly pleaded when brought before the court only as a part of the alleged libelous publication.

NECESSITY OF SETTING OUT CHARTER IN FULL IN DECLARATION by foreign corporation in an action for libel is not obviated by the use of the usual formula, that the defendant falsely and maliciously wrote, published, etc. This is sufficient in an action by a natural person for words actionable in themselves, because the law presumes such person to be of good credit and character until the contrary is shown; but the court cannot presume that the legislature of a foreign state has not granted an unwise charter and authorized the company to do the thing which the publication charges it with proposing to do.

ACTION for libel. The opinion states the case.

Tyler and Hibbard, for the plaintiffs in error.

Goodrich, Farwell, and Smith, for the defendant in error.

By Court, LAWRENCE, J. This was an action for libel brought by an insurance company incorporated under the laws of the state of Ohio. A demurrer to the declaration was sustained in the superior court, and that ruling is now assigned for error.

It has been held, both in England and in this country, that a domestic corporation may maintain an action for libel. Whether a foreign corporation may do so, is a question which we do not find to have been decided. It is only by comity that we permit a foreign corporation to bring suit in our courts upon its contracts, and it is not necessary to decide, in the present case, whether the comity should be so far extended as to permit a suit for libel, as we are of opinion that, even conceding the power to sue, the demurrer to the present declaration was properly sustained.

There are three counts in the declaration, but the alleged libel is charged substantially in the same way in each, the difference being in the degree of fullness in which the publication is set out in the different counts. In the second it is given at length, and *in hæc verba*. It is a card published by defendant, who, it appears, was formerly the agent of the plaintiffs, in which he states the company proposes to pay over thirty per cent interest to the stockholders before providing for its liabilities, and expresses the opinion that it is unworthy of confidence. This is, we understand, the offending portion of the publication.

It would be clearly against public policy to treat as libelous an article which merely assumes that an insurance corporation proposes to do for its own advantage, or that of its stockholders, whatever its charter may expressly authorize it to do. If a charter is obtained by any association which seeks to secure, for its own emolument, the control of the money of individuals, it is proper to call the attention of the public to its provisions, and to take it for granted that the corporation proposes to avail itself of whatever privileges, in dealing with the public, it has induced the legislature to bestow. A free criticism of the charter of an insurance company, or of any other incorporation which claims the confidence of the public, and seeks the possession of its funds, is to be encouraged rather than repressed, as a means of public security, and if an insurance company has procured a charter which authorizes it to pay an interest of thirty per cent per annum to its stockholders, before laying by a fund for the security of its policy-holders, we certainly cannot hold a publication libelous merely because it assumes that the company will do, for the profit of its stockholders, that which it has obtained an express power to do; and because it argues that a company, organized under such a charter, must necessarily be unworthy of public confidence.

This brings us to the precise question upon this record, namely, Does the charter of this company authorize it to do what the publication says it proposes to do? If it does, the publication cannot possibly be considered libelous. It would be merely a just criticism upon an objectionable charter, and a proper caution to the public against trusting its money to a corporation which had obtained a legislative right so to use that money as necessarily to make the public insecure. If the charter contains no such authority, and the company does not propose to do its business in this method, the publication may

be libelous. Herein consists the fatal defect in this declaration. It nowhere purports to set out the charter, either in substance or *in hæc verba*. True, the card or publication, which is set forth at length in the declaration, purports to give the charter, in order to show the justice of the criticism made upon it, but it is evidently only partially given, and even if given in full, we could not treat it as properly pleaded when only brought before us as a part of the alleged libelous publication. The plaintiff should have set out the charter at length, that the court might determine whether the publication was false in stating the mode in which it authorized the business of the company to be done.

The declaration, it is true, has the usual formula, to the effect that the defendant falsely and maliciously wrote, published, etc., but in a case of this character this is not sufficient.

It is sufficient in an action by a natural person for words actionable in themselves, because the law presumes such person to be of good credit and character until the contrary is made to appear. But we cannot presume that the legislature of the state of Ohio has not granted a very unwise insurance charter. We cannot presume that that legislature has not authorized this company to do the very thing which the defendant charges it with proposing to do, and thereby jeopardizing the interests of the policy-holders. It is not a case for presumptions. The plaintiff should have set forth its charter, and thereby enabled us to see that the defendant, in the alleged libel, falsely stated its provisions, and the plan upon which the company proposed to do its business. The defendant has not charged the plaintiff with a violation of its charter, but only that the charter itself is radically unsound, and the plaintiff has neither directly traversed the truth of these charges, nor set forth the charter by which we could have determined whether they were true or false. We hold the demurrer to have been properly sustained.

Judgment affirmed.

CORPORATION AGGREGATE MAY MAINTAIN ACTION FOR LIBEL FOR WORDS PUBLISHED of it in the way of its trade or business, or of its property and concerns, or of its officers, servants, or members, by reason of which special damage is sustained: *Trenton etc. Ins. Co. v. Perrine*, 57 Am. Dec. 400, and note 408.

COMITY: See *Ducat v. City of Chicago*, *post*, p. 529.

SPRAGUE v. DODGE.

[48 ILLINOIS, 142.]

WHERE DECLARATION IN ACTION UPON STIPULATION IN LEASE OF MILL to surrender premises in good condition, accident by fire excepted, charged that the mill was burned by a fire caused by the misconduct and carelessness of the defendant, the court committed no error in refusing to instruct the jury that they could not find a verdict against the defendant unless the evidence was such as would convict him of the crime of arson, and unless they had no reasonable doubt of his guilt, and in giving the instruction that a fair preponderance of proof which satisfied the mind of the jury was sufficient.

CRIMINAL OFFENSE CHARGED IN PLEADINGS IN CIVIL CASES must be proved beyond a reasonable doubt; but the rule does not apply to cases where the charge of criminality is not made in the pleadings.

PRESUMPTION OF INNOCENCE SHOULD BE INDULGED IN CIVIL CASES in which the pleadings do not charge a criminal offense, but either side relies upon establishing a criminal offense against the other, and the presumption can be rebutted only by such evidence as satisfies the mind of the jury. Clearer proof is necessary in such case than in one involving no criminality, but the sufficiency of the proof is to be left to the jury, and the rule of reasonable doubt does not apply.

ASSUMPSIT. The opinion states the case.

Lowell and Kellum, for the appellant.

James K. Edsall, for the appellees.

By Court, LAWRENCE, J. This was an action of *assumpsit*, brought by Dodge and Clement, against Sprague and Booth. Sprague only was served, and the trial resulted in a verdict and judgment against him, from which judgment he prosecuted an appeal.

The defendants had leased from the plaintiffs a flouring mill, and had contracted to surrender the premises at the expiration of the term in as good condition as they were in at the commencement thereof, "natural wear and tear, unavoidable accident by fire, tempest, and other casualties, only excepted." The mill was burned, and this suit was brought upon the foregoing stipulation in the lease, the declaration averring that the fire was caused by the misconduct and carelessness of the defendants. There was evidence tending to prove that the mill was set on fire by the defendant Sprague, and in reference to this testimony, his counsel asked the court to instruct the jury, in substance, that they could not find a verdict against him upon this evidence, unless it was such as would convict the defendant of the crime of arson, and if they

had any reasonable doubt of his guilt, they must find for him upon the issue raised by this portion of the testimony. The court refused this instruction, having already instructed for the plaintiff that a fair preponderance of proof, which satisfied the mind of the jury, was sufficient. It is upon this action of the court that counsel for appellant seem chiefly to rely for a reversal of the judgment.

Where in civil cases a criminal offense is charged in the pleadings, it has been held the offense charged must be proved beyond a reasonable doubt. This has been adopted as the rule of this court in actions of slander charging a criminal offense: *Crandall v. Dawson*, 1 Gilm. 556; *Harbison v. Shook*, 41 Ill. 141. Even this rule, however, is not uniform, as it has been held in Louisiana and Wisconsin that even when the offense is charged in the pleadings, the rule of evidence belonging to criminal cases does not apply: *Wightman v. West. Ins. Co.*, 8 Rob. (La.) 442; *West. Union Ins. Co. v. Wilson*, 7 Wis. 169. But even in those courts where the more rigid rule obtains, it is held only to apply to cases where the charge of criminality is made in the pleadings: *Sinclair v. Jackson*, 47 Me. 102 [74 Am. Dec. 476]; *Schmidt v. N. Y. Mut. Fire Ins. Co.*, 1 Gray, 529. The counsel for appellant cite no authority extending the rule beyond this class of cases, and we are not disposed to carry it further.

Undoubtedly, even in civil cases, where either side relies upon establishing a criminal offense against the other, that same presumption of innocence is to be indulged which we indulge in all cases until guilt is proved, and a jury should yield this presumption only to satisfactory evidence. In other words, their minds must be satisfied, and this was required by the instruction given for the plaintiff in the case before us. In order to be satisfied, they would unavoidably require clearer proof than would be necessary in a case involving no criminality, but the sufficiency of this proof must be left to them, and the court would err if it were to enjoin upon them that rule of reasonable doubt which was devised to give additional security to life and liberty against an oppressive penal code, and which is so often made the instrument in the hands of skillful counsel before an unintelligent jury of saving criminals from the punishment they deserve.

It is not necessary to discuss the other errors assigned, as counsel cannot have placed any reliance upon them.

Judgment affirmed.

PROVING EXISTENCE OF CRIME IN CIVIL ACTIONS. — Where a crime is imputed in a civil action, the question as to the amount of proof necessary to establish the existence of the crime is one upon which there has been some diversity of opinion among text-writers and judges. But there is now no doubt that the very great preponderance of modern authority is in favor of the rule that in civil cases it is sufficient to establish the existence of the crime by such evidence as would suffice to prove any other fact involved in a civil controversy. The existence of a crime may, in such cases, be proved by a preponderance of testimony, and it is not required to be proved beyond a reasonable doubt, as in criminal prosecutions: *Cooley on Torts*, 208; 2 *Wharton on Evidence*, sec. 1246; *May on Insurance*, sec. 583; 10 *Am. Law Rev.* 642; *Adams v. Thornton*, 78 *Ala.* 489; *S. C.*, 56 *Am. Rep.* 49, overruling *Steele v. Kinkle*, 3 *Ala.* 352; and *Tompkins v. Nichols*, 53 *Id.* 197; *Munson v. Atwood*, 30 *Conn.* 102; *Mead v. Husted*, 52 *Id.* 53; *S. C.*, 52 *Am. Rep.* 554; *State v. Goldsborough*, 1 *Houst. Cr. Cas.* 316; *Schnell v. Toomer*, 56 *Ga.* 168; *Bissell v. Wert*, 35 *Ind.* 54; *Continental Ins. Co. v. Jacknichen*, 110 *Id.* 59; *Welch v. Jugenheimer*, 56 *Iowa*, 11; *S. C.*, 41 *Am. Rep.* 77; *Behrens v. Germania Ins. Co.*, 58 *Iowa*, 26; *Kendig v. Overhulser*, 58 *Id.* 195; *Coit v. Churchill*, 61 *Id.* 296; *Riley v. Norton*, 65 *Id.* 306, expressly overruling *Bradley v. Kennedy*, 2 *G. Greene*, 231; *Forshee v. Abrams*, 2 *Iowa*, 571; *Fountain v. West*, 23 *Id.* 9; *Ellis v. Lindley*, 38 *Id.* 461; and *Barton v. Thompson*, 46 *Id.* 30; *S. C.*, 26 *Am. Rep.* 131; *Ætna Ins. Co. v. Johnson*, 11 *Bush*, 587; *S. C.*, 21 *Am. Rep.* 223; *Wightman v. Western M. & F. I. Co.*, 8 *Rob. (La.)* 442; *Hoffman v. Western M. & F. I. Co.*, 1 *La. Ann.* 216; *Knowles v. Scribner*, 57 *Mo.* 495; *Ellis v. Buzzell*, 60 *Id.* 209; *S. C.*, 11 *Am. Rep.* 204; *Decker v. Somerset M. F. I. Co.*, 66 *Mo.* 406; *Schmidt v. New York U. M. F. I. Co.*, 1 *Gray*, 529; *Gordon v. Parmelee*, 15 *Id.* 413; *Wallins v. Wallace*, 19 *Mich.* 57; *Elliott v. Van Buren*, 33 *Id.* 49; *S. C.*, 20 *Am. Rep.* 668; *Semon v. People*, 42 *Mich.* 141; *Peoples v. Evening News*, 51 *Id.* 11; *Hough v. Dickinson*, 58 *Id.* 89; *Burr v. Wilson*, 22 *Minn.* 206; *Thoreson v. Northwestern N. I. Co.*, 29 *Id.* 107; *Marshall v. Thames F. I. Co.*, 43 *Mo.* 586; *Rothschild v. American C. I. Co.*, 62 *Id.* 356; *Folsom v. Brawn*, 25 *N. H.* 114; *Kane v. Hibernia Ins. Co.*, 39 *N. J. L.* 697; *S. C.*, 23 *Am. Rep.* 239, reversing 38 *N. J. L.* 409; *S. C.*, 20 *Am. Rep.* 409; *Johnson v. Agricultural Ins. Co.*, 25 *Hun*, 251; *Kincade v. Bradshaw*, 3 *Hawks*, 63; *Barfield v. Brith*, 2 *Jones*, 41; *S. C.*, 62 *Am. Dec.* 190; *Strader v. Mullane*, 17 *Ohio St.* 625; *Jones v. Greaves*, 26 *Id.* 2; *S. C.*, 20 *Am. Rep.* 752; *Lyon v. Fleahman*, 34 *Ohio St.* 151; *Young v. Edwards*, 72 *Pa. St.* 257; *Hills v. Goodyear*, 4 *Lea*, 233; *S. C.*, 40 *Am. Rep.* 5; *Bradish v. Bliss*, 35 *Vt.* 326; *Weston v. Gravin*, 49 *Id.* 507; *Washington U. I. Co. v. Wilson*, 7 *Wis.* 169; *Blaeser v. Milwaukee M. M. I. Co.*, 37 *Id.* 31; *S. C.*, 19 *Am. Rep.* 747; *Scott v. Home Ins. Co.*, 1 *Dill* 105; *Howell v. Hartford F. I. Co.*, 3 *Ins. Law Jour.* 649 (*U. S. Cir. Ct.*, *N. Dist. of Ill.*). *Contra*: 2 *Greenl. Ev.*, sec. 408; *Taylor on Evidence*, 97; *Thurtell v. Beaumont*, 1 *Bing.* 339; *S. C.*, 8 *Eng. Com. L.* 531; *Schultz v. Pacific Ins. Co.*, 14 *Fla.* 73; *McConnell v. Mutual Ins. Co.*, 18 *Ill.* 228.

Said Barrows, J., delivering the opinion of the court in *Ellis v. Buzzell*, 60 *Mo.* 209, *S. C.*, 11 *Am. Rep.* 204, referring to the rule in criminal cases requiring proof of the commission of a crime by the accused to be made out to the satisfaction of the jury beyond a reasonable doubt: "But we think it time to limit the application of a rule which was originally adopted *in favorem vite* in the days of a sanguinary penal code to cases arising on the criminal docket, and no longer to suffer it to encumber the action of juries in civil suits sounding only in damages." In the case of *Peoples v. Evening News*,

51 Mich. 17, *Campbell, J.*, delivering the opinion of the court said: "In cases not criminal, and involving no punishment, the court cannot require the jury to disregard any preponderance of evidence which convinces them." In *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, S. C., 23 Am. Rep. 239, *Depue, J.*, delivering the opinion of the court, said: "The decision on this point in *Thurtell v. Beaumont* was made on an application for a rule, without much consideration. It has never received approval in the English courts, although, as a rule of evidence, occasions have repeatedly arisen for its adoption and application." In *Folsom v. Brown*, 25 N. H. 122, *Eastman, J.*, delivering the opinion of the court, said: "If a party brings a suit for an injury sustained by a charge against his character, and the adverse party relies upon its truth for a justification, the latter ought to have that fact tried in the same way that other facts are tried in civil cases." And in the case of *Continental Ins. Co. v. Jachnichen*, 110 Ind. 63-64, *Mitchell, J.*, delivering the opinion of the court, said: "Some of the text-writers, and several of the earlier reported cases, approve the doctrine that where a criminal act is charged even in a civil action, other than slander or libel, the charge must be established beyond a reasonable doubt, before a recovery can be had by the party making the charge. . . . The more recent authorities are, however, decidedly adverse to this view. . . . Indeed, so far as we have observed, all the courts which, in some of the earlier cases, applied the rule under consideration to civil actions have more latterly receded from their former holdings in that regard." This question does not seem to have been decided as yet in the court of appeals in New York, but *Smith, P. J.*, in delivering the opinion of the court in *Johnson v. Agricultural Ins. Co.*, 25 Hun, 254, said: "In the absence of controlling adjudications upon the subject in this state, we are content to follow them until the court of last resort shall lay down a different rule." Judge Cooley says: "Where the charge complained of imputes to the plaintiff criminal conduct, and the truth is relied upon as a justification, it is sufficient to support the plea by a preponderance of evidence; it is not necessary that the crime be made out beyond a reasonable doubt. This is a general rule where the question of criminality is made an issue in a civil suit; it is sufficient to establish it by such evidence as would support any other fact involved in a civil controversy": Cooley on Torts, 208.

While the evident tendency of the later decisions is to treat as general the rule that in proving the existence of a crime in a civil action a mere preponderance of evidence is sufficient, and that it is not necessary to prove the fact in issue beyond a reasonable doubt, there are yet a few decisions that recognize a distinction in the application of the rule, holding that in some cases the rule is, that criminality must be proved beyond a reasonable doubt. We propose to consider separately the various classes of cases in which the question of the application of this rule has arisen.

IN INSURANCE CASES where the defense imputes to the plaintiff the crime of arson in willfully setting fire to the property destroyed, it is believed that with the exception of the cases of *Thurtell v. Beaumont*, 1 Bing. 339, S. C., 8 Eng. Com. L. 531, *Schultz v. Pacific Ins. Co.*, 14 Fla. 73, and *McConnell v. Delaware M. S. I. Co.*, 18 Ill. 228, all the authorities maintain that the existence of the crime may be proved by a preponderance of evidence: Cooley on Torts, 208; May on Insurance, sec. 583; *Scott v. Home Ins. Co.*, 1 Dill. 105; *Howell v. Hartford F. I. Co.*, 3 Ins. Law Jour. 649; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59; *Behrens v. Germania Ins. Co.*, 58 Iowa, 26; *Ætna Ins. Co. v. Johnson*, 11 Bush, 587; S. C., 23 Am. Rep. 223; *Wightman v. Western*

M. & F. I. Co., 8 Rob. (La.) 442; *Hoffman v. Western M. & F. I. Co.*, 1 La. Ann. 216; *Decker v. Somerset M. F. I. Co.*, 66 Me. 406; *Schmidt v. New York U. M. F. I. Co.*, 1 Gray, 529; *Marshall v. Thames F. I. Co.*, 43 Mo. 586; *Rothschild v. American C. I. Co.*, 62 Id. 356; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; S. C., 23 Am. Rep. 239; *Johnson v. Agricultural Ins. Co.* 25 Hun, 251; *Washington U. Ins. Co. v. Wilson*, 7 Wis. 169; *Blaeser v. Milwaukee M. M. I. Co.*, 37 Id. 31; S. C., 19 Am. Rep. 747.

IN ACTIONS FOR SLANDER OR LIBEL where the defendant is charged with having accused the plaintiff with the commission of a crime, it is held by the weight of modern authority that the defendant may sustain his defense by a preponderance of evidence tending to prove the truth of the accusation: *Riley v. Norton*, 65 Iowa, 306; *Sloan v. Gilbert*, 12 Bush, 51; S. C., 23 Am. Rep. 708; *Ellis v. Buzzell*, 60 Me. 209; S. C., 11 Am. Rep. 204; *Matthews v. Huntley*, 9 N. H. 150; *Folsom v. Brown*, 25 Id. 114; *Kincade v. Bradshaw*, 3 Hawks, 63; *Barfield v. Britt*, 2 Jones, 41; *Bradish v. Bliss*, 35 Vt. 326. *Contra: Tucker v. Call*, 45 Ind. 31; *Polston v. See*, 54 Mo. 291, Sheldon, J., dissenting. It seems difficult to find any good reason for drawing a distinction between slander and libel cases and any other civil action, so far as the rule we are now considering is concerned. It certainly appears to be unjust to hold that, in such actions, the plaintiff who charges the defendant with a crime may prove it by a preponderance of evidence, while the defendant who charges the plaintiff with a crime is required to prove it beyond all reasonable doubt. In *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, S. C., 23 Am. Rep. 239, Depue, J., who delivered the opinion of the court, said, although the question was not involved in that case, that in his opinion, actions of libel and slander might be regarded as exceptional in their character. But Dixon, J., who concurred in the judgment, said: "Several of my brethren unite with me in desiring to exclude the inference that we assent to the intimation contained in the opinion just read, as to the exceptional character of actions of libel and slander. We prefer that that matter should remain open, to be decided when its decision is necessary."

IN PROSECUTIONS FOR BASTARDY, it is held by all the authorities that the charge may be proved by a preponderance of evidence. The proceeding, though criminal in form, is a civil action, and not a criminal one: *Mann v. People*, 35 Ill. 467; *Maloney v. People*, 38 Id. 62; *Allison v. People*, 45 Id. 37; *People v. Christman*, 66 Id. 162; *Knowles v. Scribner*, 57 Me. 495; *Young v. Makepeace*, 103 Mass. 50; *Semon v. People*, 42 Mich. 141; *State v. Nichols*, 29 Minn. 357. And the same is true of an action to recover the forfeiture for selling liquor to minors: *Roberge v. Burnham*, 124 Mass. 277. And although an action brought by a wife for causing the intoxication of her husband is regarded as penal, yet it is not necessary that the evidence in such a case should exclude all reasonable doubt. A preponderance of evidence is sufficient: *Hall v. Barnes*, 82 Ill. 228; *Lyon v. Fleakman*, 34 Ohio St. 151.

IN ACTIONS FOR DIVORCE, where adultery is charged, some courts hold that the charge can only be sustained by evidence that will satisfy the mind of the court beyond a reasonable doubt: *Berckmans v. Berckmans*, 17 N. J. Eq. 453; *Freeman v. Freeman*, 31 Wis. 235; and see also *Blaeser v. Milwaukee M. I. Co.*, 37 Id. 31; S. C., 19 Am. Rep. 747. Van Dyke, J., who delivered the opinion of the court in *Berckmans v. Berckmans*, *supra*, said: "The charge made by the complainant, if true, is known to our law as a crime; consequently, this prosecution partakes strongly of the nature of a criminal proceeding, so much so as to place the complainant under the necessity, not

only of placing a decided preponderance of testimony in favor of the charge, but of proving it to the satisfaction of this court beyond a reasonable doubt." But as the same reasoning would apply to other crimes as well as to adultery, it seems hard, if not impossible, to reconcile the decision in *Berckmans v. Berckmans* with that in *Kane v. Hibernia Ins. Co.*, or the decision in *Freeman v. Freeman*, which is placed upon substantially the same grounds with that in *Blaeser v. Milwaukee M. M. I. Co.*, all cited *supra*.

WHERE FRAUD IS CHARGED, or false representations, or a trespass which might subject the trespasser to a criminal prosecution, the mere preponderance of evidence is held to be sufficient by the great majority of the authorities: *Munson v. Atwood*, 30 Conn. 102; *Kendig v. Overhulser*, 58 Iowa, 26; *Coit v. Churchill*, 61 Id. 296; *Gordon v. Parmelee*, 15 Gray, 413; *Elliott v. Van Buren*, 33 Mich. 49; S. C., 20 Am. Rep. 668; *Hough v. Dickinson*, 58 Mich. 89; *Burr v. Willson*, 22 Minn. 206; *Thoreson v. Northwestern N. I. Co.*, 29 Id. 107; *Jones v. Greaves*, 26 Ohio St. 2; S. C., 20 Am. Rep. 752; *Young v. Edwards*, 72 Pa. St. 257; *Weston v. Gravelin*, 49 Vt. 507.

PREPONDERANCE OF EVIDENCE MUST BE SUFFICIENT TO OVERCOME PRESUMPTION OF INNOCENCE, in all cases where a crime is charged or imputed. This principle is firmly maintained in all the cases. Every man charged with a crime is entitled to the presumption of innocence, and the party who brings the charge is bound to overcome that presumption by evidence: *Decker v. Somerset M. F. I. Co.*, 66 Me. 406; *Jones v. Greaves*, 26 Ohio St. 2; S. C., 20 Am. Rep. 752; *Hills v. Goodyear*, 4 Lea, 233; S. C., 40 Am. Rep. 5; *Bradish v. Bliss*, 35 Vt. 326. Cooper, J., in delivering the opinion of the court in *Hills v. Goodyear*, *supra*, said: "It does not follow, however, that a party who is charged in a civil case with crime or moral dereliction may not have the benefit of good character and the presumptions of law in favor of innocence. Evidence of good character is admitted in criminal prosecutions, because the intent with which the act charged as a crime was done is of the essence of the issue; and the prevailing character of the defendant's mind, as evinced by his previous habits of life, is a material element in discovering that intent. Upon the same principle the like evidence ought to be admitted in all other cases, whatever be the form of proceeding, when the intent, to be found as a fact, is involved in the issue." Walton, J., in delivering the opinion of the court in *Decker v. Somerset M. F. I. Co.*, 66 Me. 408, said: "To create a preponderance of evidence, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence. Presumptions, like probabilities, are of different degrees of strength. To overcome a strong presumption requires more evidence than to overcome a weak one. To fasten upon a man a very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his known inclinations. To fasten upon a man the act of willfully and maliciously setting fire to his own buildings should certainly require more evidence than to establish the fact of payment of a note, or the truth of an account in set-off; because the improbability or presumption to be overcome in the one case is much stronger than it is in the other. Hence it can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evidence should be required to establish grave charges than to establish trifling or indifferent ones. Such an instruction does not violate the rule that in civil suits a preponderance of evidence is all that is required to maintain the affirmative of the issue; for, as already stated, to create a preponderance of evidence, it must be suffi-

cient to overcome the opposing presumptions as well as the opposing evidence." And McIlvaine, C. J., in delivering the opinion of the court in *Jones v. Greaves*, 26 Ohio St. 2, S. C., 20 Am. Rep. 752, said: "Where the facts charged involve moral turpitude, there is a presumption of innocence which stands as evidence in favor of the party charged; and the more heinous the offense, the stronger the presumption. It is only where the testimony, when considered in connection with the presumptions of law arising in the case, preponderates in favor of the charge that its truth should be found; but when so found by discreet and reasonable triers, the issue should be determined in accordance with the preponderance, although it may not be said that the proof has removed all reasonable doubts."

THE PRINCIPAL CASE IS CITED to the point that where no crime is imputed in the pleadings, it is not necessary that the jury be satisfied upon the point, beyond a reasonable doubt: *Wallace v. Wallace*, 8 Ill. App. 71.

DUCAT v. CITY OF CHICAGO.

[48 ILLINOIS, 172.]

CORPORATION IS NOT CITIZEN WITHIN CLAUSE OF CONSTITUTION declaring that "the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states."

CORPORATION IS CITIZEN IN SENSE TERM IS USED IN PORTION OF CONSTITUTION conferring jurisdiction on the United States courts in cases between citizens of different states.

POWER OF CORPORATION CREATED IN ONE STATE TO MAKE CONTRACTS and enforce them in another state depends upon the comity between the states; and this comity is the voluntary act of the sovereignty by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests.

DISCRIMINATION IN TAXATION MAY BE MADE BETWEEN FOREIGN CORPORATIONS and domestic corporations of the same character.

TAX IMPOSED UPON CORPORATION IS NOT TAX UPON PERSONS OR PROPERTY of corporators or stockholders. It is the artificial being, the mere legal entity, which is taxed, and the tax is paid out of its funds. And as a foreign corporation has no status as a citizen of the state creating it, the objection that a tax imposed upon it is not uniform cannot be maintained.

DEBT. The opinion states the case.

Scammon, McCagg, and Fuller, for the appellant.

S. A. Irvin, for the appellee.

By Court, **BREESE, C. J.** This was an action of debt, brought in the superior court of Chicago, by the city of Chicago, against Arthur C. Ducat, to recover of him, as agent of four several insurance companies, located and established in the state of New York, by virtue of the laws of that state, for the sum of two dollars upon every hundred dollars of premiums he, as

such agent, had received on policies issued by said companies, severally, while they were doing business as such companies in the city of Chicago.

Besides the plea of *nil debet*, on which an issue was made up, the defendants filed a special plea, to which a demurrer was sustained, and by consent the cause was tried by the court on the general issue.

The court found for the plaintiff \$3,756.39 as the debt due, for which judgment was rendered, together with costs.

To reverse this judgment the defendant prosecutes this appeal, assigning as error, sustaining the demurrer to the special plea.

The claim of the city to recover of the defendant is founded upon the fifth section of the revised charter of the city of Chicago (Pr. Laws 1863, pp. 98, 99), the provisions of which are sufficiently set forth in the declaration.

The special plea, which was demurred out, presented the question of the power of the legislature to make a discrimination between foreign and domestic insurance companies, by taxing them on the premiums received, and letting the domestic corporations go untaxed on the same, the former having complied with the laws of the state permitting them to exercise their faculties in this state.

Appellant takes the ground that after this state has authorized insurance companies to establish agencies and do business here, it cannot tax their property more, or differently, than the property of citizens of the state is taxed.

This is an important and a very interesting question, and we have very carefully considered the points made by appellant, and the arguments in their support, and have reached the conclusion that corporations are not citizens within the meaning of section 2 of article 4 of the constitution of the United States.

Appellant's proposition is, that corporations created by the laws of New York are, to the intents and purposes for which they are created, citizens of New York, and as such entitled to all the benefits of the section above cited, that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

We have examined all the authorities cited on both sides of this proposition, and cannot find it has ever been decided, by any court, that corporations are citizens within the sense and meaning of this clause.

The cases of *Louisville etc. R. R. Co. v. Letson*, 2 How. 497, and *Covington Drawbridge Co. v. Shepherd*, 20 Id. 227, do not establish the proposition in plaintiff's favor. In both cases the question was one of jurisdiction, and no reference is made in either case to this clause of the constitution, and therefore are not decisive of the point. In the last-named case, Chief Justice Taney, in delivering the opinion of the court, said that "in the case of *Lafayette Ins. Co. v. French*, 18 Id. 404, the declaration stated that the corporation itself was a citizen of Indiana. Now, no one, we presume, ever supposed that the artificial being, created by an act of incorporation, could be a citizen of a state in the sense in which that word is used in the constitution of the United States, and the averment was rejected because the matter averred was simply impossible."

By referring to the case in 18 How. 404, it appears the opinion of the majority of the court was delivered by Mr. Justice Curtis, and in it he says: "The averment that the company is a citizen of Indiana can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state, within the meaning of the constitution."

The case in 2 Howard decides nothing more than that, for all the purposes of suing and being sued, a corporation created by and doing business in a particular state is substantially a citizen of the state which created it, within the meaning of the constitution and law of Congress, conferring jurisdiction on the courts of the United States, in cases between citizens of different states. Having this right conceded to it, a corporation may properly be considered a citizen of the state of its creation, for the purpose of bringing suit; but we are inclined to think the concession was an unfortunate one. The first case in which the question came up was the case of *Hope Ins. Co. v. Boardman*, 5 Cranch, 57. It was argued for the plaintiff in error, the insurance company, by Mr. Ingersoll, who made the point that a corporation aggregate could not be a citizen of any state, and there was no averment of citizenship in the declaration of the individuals who composed the corporation.

Referring to *Bingham v. Cabot*, 3 Dall. 382, which case holds it was necessary to set forth the citizenship, or alienage when a foreigner was concerned, of the respective parties, in order

to bring the case within the jurisdiction of the court, and that the record in that respect was defective.

Mr. Adams, afterwards President of the United States, argued for the defendant in error, and said, speaking of the declaration in the case, that the defendant was described as "a company legally incorporated by the legislature of the state of Rhode Island and Providence Plantation, and established at Providence, in the said district." He said: "The term 'citizen' could not with propriety be applied to a corporation aggregate. It could only be a citizen by intendment of law. It is only a moral person; but it may be a citizen *quoad hoc*, that is, in the sense in which the term 'citizen' is used in that part of the constitution which speaks of the jurisdiction of the judicial power of the United States. The term is indeterminate in its signification. It has different meanings in different parts of the constitution. When it says 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,' the term 'citizens' has a meaning different from that in which it is used in describing the jurisdiction of the courts."

There was pending in that court, and argued at the same time, the case of *Bank of the United States v. Deveaux*, 5 Cranch, 61. It was argued by the most distinguished lawyers of that day, and the opinion in the last case was, that no right was conferred upon the bank by the act of incorporation, to sue in the federal courts; but following a decision in 12 Modern [*City of London v. Wood*], a book of questionable authority, and finding that the English judges had declared that they could look beyond the corporate name, and notice the character of the individual corporators, it was decided that a corporation aggregate, composed of citizens of one state, might sue a citizen of another state in the circuit court of the United States. In the course of the opinion, Chief Justice Marshall said: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen, and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members in this respect can be exercised in their corporate names"; and in casting about for authority to sustain such a proposition, the distinguished chief justice quoted and relied upon 12 Modern!

The case in 2 Howard, *supra*, has modified this opinion in 5 Cranch, adopting the argument of Mr. Adams in his Hope

Insurance Company case, that a corporation was *quoad hoc* a citizen for the purpose of suing and being sued.

It seems to us there is much more sound sense, and a more just appreciation of this subject, to be found in the view expressed by Chief Justice Taney, in the case of *Bank of Augusta v. Earle*, 13 Pet. 519, cited with so much deserved approbation by appellant's counsel, in which he places the power of a corporation, created in one state, to make contracts in another state, upon the comity between the states, and says that the comity thus extended is no impeachment of sovereignty, it being the voluntary act of the state by which it is offered, but inadmissible when contrary to its policy or prejudicial to its interests.

This power, then, existing by comity only, and such comity inadmissible when it is contrary to the policy of a state to admit it, the pretense that in this respect the corporation is vested with all the rights of a citizen of another state vanishes. The same comity which recognizes their contracts should recognize their power to enforce them by suit; otherwise the power to contract would be in a great degree nugatory.

Appellant's counsel refer to *Campbell v. Morris*, 3 Har. & McH. 554, but it decides nothing pertinent to the case now before us. In construing section 2 of article 4, the court endeavors to affix a meaning to the words "immunities" and "privileges," and concluding, they do not mean the right to hold office, or to possess the elective franchise; the court thought they meant that the citizens of all the states should have the peculiar advantage of acquiring and holding real as well as personal property, and that such property should be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected. That it meant that such property should not be liable to any taxes or burdens which the property of the citizen is not subject to.

We accept this construction, and fully accord with the reasoning and conclusion in *Wiley v. Parmer*, 14 Ala. 627; and the principle sanctioned in *Oliver v. Washington Mills*, 11 Allen, 268, has been often declared by this court. Non-resident owners cannot be taxed higher than residents, nor are they under the law we are considering. The individuals composing the corporation may be citizens, but the ownership of their corporate property is not in the individual members, but

in the corporation. As was said by Chief Justice Taney, in the case in 13 Peters, *supra*, if the members of a corporation are to be regarded as individuals, carrying on business in their corporate names, and therefore entitled to the privileges of citizens in matters of contract, it is very clear they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be, as he very justly says, to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them in any state in which he might happen to be found. The clause of the constitution referred to, he says, certainly never intended to give to the citizens of each state the privileges of citizens of the several states, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself. Besides, it would deprive every state of all control over the extent of corporate franchises proper to be granted in the state, and corporations would be chartered in one to carry on their operations in another. He further says: "Whenever a corporation makes a contract, it is the contract of the legal entity,—of the artificial being created by the charter,—and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state."

These passages from that opinion settle us in our convictions that corporations have no *status* in states as citizens of the state creating them; and when they come into this state to do business and make profits, a discrimination can be rightfully made between them and our domestic corporations of the same character; that if it should be deemed good policy by the legislature, they could be so taxed, or otherwise burdened as to compel them to leave the state. They may be regarded as a benefit or a nuisance, according to the caprice of the legislature, they not being citizens in any approved sense of that term, which can be correctly understood in no other sense than that in which it was understood in common acceptance when the constitution was adopted, and as it is universally explained by writers on government, without an exception. A

citizen is of the *genus homo*, inhabiting, and having certain rights in, some state or district. Such a being, if a citizen of New York, or of any other state of this Union, is for many purposes a citizen of this state, and of all the other states, and is entitled to all such privileges and immunities, within the purview of the constitution, as the citizens of those states permanently residing therein are entitled to. These are personal privileges, many of which are specified in the case of *Corfield v. Coryell*, 4 Wash. C. C. 371, cited approvingly by appellant.

These privileges attach to him in every state into which he may enter as to a human being, — as a person with faculties to appreciate them, and enjoy them, not to an intangibility, a mere legal entity, an invisible artificial being, but to the man, made in God's own image.

The individual citizen has the power of moving from place to place, as his business or his pleasure may prompt. He has rights which are so important as to make it desirable that they should be uniform throughout this broad and expanded Union, which, in order to promote mutual friendship, and free, social, or business intercourse among the people of the several states, were placed by this clause of article 4 under the protection of the federal government. In the case of corporations no such reasons exist. Corporations, in the states of their creation, are not entitled to the privileges or "rights," as appellant claims, of the citizens of such states. They cannot vote at elections, they are ineligible to any public office, they cannot be executors, administrators, or guardians. They are artificial beings, endowed only with such powers and privileges and rights as their creator thought proper to bestow upon them. They have not the power of locomotion, and of course are not fit subjects, in the view above expressed, of the constitutional clause on which this cause turns. Not being able to go into the states of the Union at their corporate will and pleasure, and exercise their faculties therein, they cannot, by any reasonable and just view of that clause, be deemed as coming within its spirit or object.

This tax of two dollars imposed on these companies is not a tax on the persons or property of the corporators or stockholders. It is the artificial being, the mere legal entity, which is taxed, and the tax is paid out of the funds of the corporation. The immunity claimed by appellant is claimed on

behalf of the corporation as such, and not in behalf of the individual stockholders, and cannot be allowed.

As was said by the supreme court of New Jersey in *Tatem v. Wright*, 23 N. J. L. 429, the business transacted by the appellant is the business of the several corporations whom he represents; and although the several stockholders are interested in that business, and their profits may be affected by the taxes imposed, yet as they choose to transact it through the medium of an incorporated name, having no personal character or rights, and not properly within the designation of a citizen, they must take their charters with all the disabilities properly belonging to them, one of which is, if an incorporation goes beyond the limits of the sovereignty which created it, it must submit to such terms as such other sovereignties see fit to impose.

The views we have here expressed render it unnecessary to consider the authorities cited by appellee. We have looked into some of them, and they fortify the positions the city has taken.

The point made, that this is a tax, and not uniform, and therefore unconstitutional, is fully answered by the case of the *People v. Thurber*, 13 Ill. 554, and the *Firemen's Benevolent Association v. Lounsbury*, 21 Id. 511 [74 Am. Dec. 115].

There being no error in the record, the judgment is affirmed.
Judgment affirmed.

COMITY DOES NOT PREVAIL IN DEROGATION OF POSITIVE LAW: *Smith v. McAttee*, 92 Am. Dec. 641. See also *Hahnemannian Life Ins. Co. v. Beebe*, ante, p. 519.

POWER OF STATE TO DISCRIMINATE AGAINST FOREIGN CORPORATIONS DOING BUSINESS THEREIN. — The right of individuals to be a corporation and to act in a corporate capacity is a peculiar privilege, the creation of local law, and cannot by the mere force of that law exist or be exercised beyond the territorial limits of the state which enacts it: *Commonwealth v. Milton*, 12 B. Mon. 212; S. C., 54 Am. Dec. 522. Foreign corporations are, by the comity of nations, permitted to make contracts in other states and to establish agencies and carry on business there, unless they are excluded from so doing, or unless such permission is against the policy or interest of such states: *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; S. C., 47 Am. Dec. 129; *Williams v. Cresswell*, 51 Miss. 817; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Ohio L. & T. Co. v. Merchants' L. & T. Co.*, 11 Humph. 1; S. C., 53 Am. Dec. 742. But a corporation created by one state can transact business in another state only with the consent, express or implied, of the latter state. The existence of a corporation in a foreign jurisdiction is recognized, not by right, but of grace: *Farmers' and Merchants' Ins. Co. v. Harrah*, 47 Ind. 236; *Home Ins. Co. v. Davis*, 29 Mich. 238; *Erie Ry. Co. v. State*, 31 N. J. L. 531; S. C., 86 Am. Dec. 226; *People v. Fire Association of Philadelphia*, 92 N. Y. 311;

Western Union Telegraph Co. v. Mayer, 28 Ohio St. 521; *Bank of Augusta v. Earle*, 13 Pet. 519; *Lafayette Ins. Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Id. 566. A state has power to wholly exclude from its territory corporations chartered by other states, and the motive of such exclusion cannot be inquired into: 2 Morawetz on Corporations, 2d ed., sec. 971; *People v. Fire Association of Philadelphia*, 92 N. Y. 311; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Ducat v. Chicago*, 10 Wall. 410, affirming the decision in the principal case; *Doyle v. Continental Ins. Co.*, 94 U. S. 535. A state may, in its discretion, require a foreign corporation to comply with certain prescribed formalities, to pay taxes, licenses, etc., and to assume obligations that may be required of it, as a condition precedent to its right to transact business within its jurisdiction: *Netley v. Clark-Gardner L. M. Co.*, 4 Col. 369; *Goldsmith v. Home Ins. Co.*, 62 Ga. 379; *People v. Thurber*, 13 Ill. 354; *Firemen's B. A. v. Lonsbury*, 21 Id. 511; S. C., 74 Am. Dec. 115; *Cincinnati M. H. A. Co. v. Rosenthal*, 55 Ill. 85; S. C., 8 Am. Rep. 626; *Western Union Tel. Co. v. Lieb*, 76 Ill. 174; *Farmers' and Merchants' Ins. Co. v. Harrah*, 47 Ind. 236; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; *State v. Fiedick*, 21 La. Ann. 434; *Attorney-General v. Bay State M. Co.*, 99 Mass. 148; *Home Ins. Co. v. Davis*, 29 Mich. 238; *People v. Inlay*, 20 Barb. 68; *People v. Fire Association of Philadelphia*, 92 N. Y. 311; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 136; *Lamb v. Lamb*, 13 Nat. Bank. Reg. 17; *Lafayette Ins. Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Id. 410; *Liverpool Ins. Co. v. Massachusetts*, 10 Id. 566; *St. Clair v. Cox*, 106 U. S. 350; 2 Morawetz on Corporations, 2d ed., sec. 971.

It has been uniformly held that corporations are not citizens within the meaning of section 2 of article 4 of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states": *Cincinnati M. H. A. Co. v. Rosenthal*, 55 Ill. 85; S. C., 8 Am. Rep. 626, citing the principal case; *Farmers' and Merchants' Ins. Co. v. Harrah*, 47 Ind. 236; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; *Home Ins. Co. v. Davis*, 29 Mich. 238; *People v. Inlay*, 20 Barb. 68; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Wheeden v. Camden and Amboy R. R. & T. Co.*, 2 Phila. 23; *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 186; Cooley on Taxation, 2d ed., 100. The privileges and immunities secured by the constitution to the citizens of each state in the several states are those privileges and immunities which are common to the citizens in the latter states under their constitutions and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured by it in other states. Mr. Justice Field, in delivering the opinion of the court in *Paul v. Virginia*, 8 Wall. 181, in discussing this subject, said: "Now, a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. . . . Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely. They may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The

whole matter rests in their discretion." In that case it was decided that a state statute which enacts that no insurance company not incorporated under the laws of the state passing the statute shall carry on its business within the state without previously obtaining a license for that purpose, and that it shall not receive such license until it has deposited with the treasurer of the state bonds of a specified character, to an amount varying from thirty to fifty thousand dollars according to the extent of the capital employed, is not in conflict with that clause of the constitution of the United States which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," nor with the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several states."

In *Goldsmith v. Home Ins. Co.*, 62 Ga. 379, it was decided that a state may impose upon foreign corporations, as a condition of their doing business within the state of Georgia, the same burdens in the way of licenses, taxes, etc., as the state of their incorporation imposed upon Georgia corporations as a condition of their doing business within their jurisdictions. In *People v. Fire Ass'n of Philadelphia*, 92 N. Y. 311, a statute of New York was sustained, which provided that a foreign corporation should pay to the New York superintendent of the insurance department, for taxes, fines, etc., an amount equal to that imposed by the "existing or future laws" of the state of its origin, upon New York companies seeking to do business there, when such amount should be greater than that required for such purposes by the then existing laws of New York. In *Lafayette Ins. Co. v. French*, 18 How. 404, it was held that a state may impose as a condition of a foreign corporation's doing business therein that process on the corporation's agent shall be considered as service upon the corporation itself; and that such a condition is neither unconstitutional nor unreasonable. In *Home Ins. Co. v. Davis*, 29 Mich. 238, it was held that a condition that foreign corporations shall submit themselves to the jurisdiction of the state courts, and not transfer causes to the federal courts, was valid. But see *Insurance Co. v. Morse*, 20 Wall. 445, and *Doyle v. Continental Ins. Co.*, 94 U. S. 535, where it was held that a statute which enacted that a foreign corporation should not transact business in the state in which it was enacted, unless it stipulated in advance that it would not remove into the federal courts any suit that might be commenced against it in the state, was held to be repugnant to the constitution of the United States, and void; and that an agreement entered into pursuant to such statute was of no effect. In reference to conditions touching the service of process upon foreign corporations, Mr. Justice Field, in delivering the opinion of the court in *St. Clair v. Cox*, 106 Id. 356, said: "If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable; and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation."

POWER TO DISCRIMINATE. — As a necessary deduction from the principles already discussed, it is clear that a state has power to discriminate against foreign corporations desiring to transact business within its ter-

ritory. And it has been expressly decided, both by the state and federal courts, that a state has the right to impose upon corporations chartered by other states a tax or burden for the privilege of transacting their business therein, although no such burdens are imposed upon like corporations chartered by its own legislature: Angell and Ames on Corporations, sec. 486 a; *St. Clair v. Cox*, 106 U. S. 350; *Commonwealth v. Milton*, 12 B. Mon. 212; S. C., 54 Am. Dec. 522; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; *State v. Fosdick*, 21 La. Ann. 434; *Tatem v. Wright*, 23 N. J. L. 429; *Fire Department v. Noble*, 3 E. D. Smith, 440; *Fire Department v. Wright*, 3 Id. 453; *Slaughter v. Commonwealth*, 13 Gratt. 767; *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 136. But see *Erie R'y Co. v. State*, 31 N. J. L. 531, S. C., 86 Am. Dec. 226, where it was held that a state cannot tax a foreign corporation upon a different principle or in a different manner from what she can tax her own domestic corporations. The right of a state to tax a foreign corporation may be conferred by the legislature upon a municipal corporation: Angell and Ames on Corporations, sec. 486 a.

THE PRINCIPAL CASE IS CITED to the point that corporations created in another state are not citizens of such state within the meaning of the federal constitution: *Cincinnati etc. Co. v. Rosenthal*, 55 Ill. 90; and cannot exercise their functions in another state or a different sovereignty without permission: *Carroll v. East St. Louis*, 67 Id. 570. And therefore a foreign corporation may be taxed to any extent as the condition upon which it shall be allowed to exercise its franchises and privileges: *Western Union Tel. Co. v. Lieb*, 76 Id. 173; see *Ducat v. Chicago*, 10 Wall. 410.

PITTSBURG, FORT WAYNE, AND CHICAGO RAILWAY COMPANY v. BUMSTEAD.

[48 ILLINOIS, 221.]

CHILD IS NOT TRESPASSER, AND HIS PARENTS ARE NOT GUILTY OF NEGLIGENCE, where it appeared that the child, who was four years old and was living with his parents in close proximity to the defendants' railway track, was left by his mother, who had occasion to visit a neighbor, with his sister, a girl fourteen years of age, and while she was engaged in some necessary duty the boy left the house, and while he was within the defendants' right of way, but upon a private road which crossed the track and was used by the public, the accident happened; and that it was caused by a train colliding with a push-car, and shattering the car to pieces, a fragment of which struck the boy, who was at some considerable distance from the place of collision, and caused the injuries complained of; for the boy, in common with the rest of the public, had a right to be on the private road and within the defendants' right of way, until its use by the public should be prohibited by the company.

MOTHER WHO LEAVES CHILD FOUR YEARS OF AGE WITH HIS SISTER fourteen years of age, who is shown to be intelligent and affectionate, while the mother visits a neighbor, is not guilty of contributory negligence, in an action against a railroad company for injuries to the child.

RAILROAD COMPANY IS LIABLE FOR NEGLIGENCE OF AGENT IN LOANING PUSH-CAR to persons unaccustomed to its use, who left it upon the track, whereby a collision occurred.

NEGLECT OF ENGINEER IS NEGLIGENCE OF RAILROAD COMPANY, where he might have stopped the train and avoided a collision with a push-car, but did not do so though warned by signals of persons, and though the push-car was in sight for more than a mile; and it is no excuse that he supposed the car to be in the charge of section-men who would remove it from the track upon the approach of the train, for he should have known that the car was not under the control of railroad employees, by the fact that they did not attempt to remove it on the signal being given.

CASE. The opinion states the facts.

E. A. Storrs, for the appellants.

David B. Lyman, for the appellee.

By Court, BREESE, C. J. This was an action of trespass on the case, brought to the Cook circuit court, by Thomas Bumstead, against the Pittsburg, Fort Wayne, and Chicago Railway Company, to recover damages for an injury to his minor son, occasioned by the careless management of the locomotive and train of the defendants. The injury occurred at a station, on the defendants' road, in the state of Indiana, called Castello.

The cause was tried by a jury, who returned a verdict against the defendants of four thousand five hundred dollars. A motion for a new trial was made by the defendants, which was overruled. On the plaintiff remitting, at the instance of the court, three thousand dollars of the verdict, thereupon judgment was entered against the defendants for the sum of fifteen hundred dollars.

To reverse this judgment, the defendants have appealed to this court, and several points are made, which we will notice.

It appears the injured party was a child about four years of age, living with his parents in close proximity to the defendants' railway track. On the day of the accident, he was left by his mother, who had occasion to visit a neighbor, in charge of his sister, a girl fourteen years of age, and while she was engaged in some necessary duty in the house, the boy, without her knowledge, left the house, and soon after was found, to all appearance, dead, near the track, and was taken up and brought to his house, one of his feet crushed, and otherwise wounded. It appears a private cart-road crossed the track near the dwelling of the boy's parents, which was used, without question, by every one who had occasion to use it. It was on this road the accident occurred, and was occasioned by an express train running, with great velocity, into a push-car in advance of it, going in the same direction of the train, and such was the force of the collision that the push-car was shattered to pieces,

a fragment of which struck the boy, who was on this private road, and some considerable distance from the place of collision.

The first point made by appellants is, that the child was a trespasser on appellants' right of way, and his parents, in suffering him to be there, were guilty of such a degree of negligence as to furnish a complete defense to the company for an injury which would not have occurred but for this wrongful intrusion, unless the company shall be shown to be guilty of negligence so gross as to imply a willingness to inflict the injury.

The place where the accident occurred was, in fact, on appellants' right of way, though not upon the track. The boy was struck while on a road used by the public, which crossed the track, and where he, in common with the rest of the public, had a right to be, until the company should forbid or prevent so much of its right of way from use by the public.

The next point made by appellants is, that the parents of this child were guilty of great negligence in leaving him with his young sister. We cannot perceive, admitting it is a duty of the most imperious obligation resting upon parents to use vigilance in the care of their offspring of tender years, that the parents of this child were wanting in this requirement. A mother cannot be always, at all hours, with her child, nor is there any necessity she should be, nor is it practicable. She must perform her accustomed avocations, and in one moment a child of four years of age may escape from her notice; it cannot be otherwise. The parents of this boy, the evidence shows, were in a very humble walk of life, who had, the mother especially, something more important to do than to watch her child lest he came to harm. She had to contribute her labor to feed and clothe him, and it is unreasonable to demand she should have no other employment than to guard her child from danger. Leaving the child with his sister, a girl of fourteen years of age, and who appears from her testimony to be intelligent and affectionate, was not negligence. It was unavoidable, and she was trustworthy, and competent to take the charge of the child. What would be the public judgment of a rule of law which should forbid a mother to leave a child four years of age with his sister of fourteen, while the mother was providing for their sustenance, or enjoying herself by a short visit to a neighbor? Such a rule would not receive the sanction of any court, and is not to be found in any adjudged case, or in any legislative enactment, and has

no reason in its favor. There was no negligence of the mother, and the child was in a place where he had a right to be, and at a safe distance from the railroad track.

The remaining point is, there was no negligence on the part of those having the train in charge.

On this point, the evidence establishes negligence in two particulars: 1. In loaning the push-car to be used by strangers; and 2. In not stopping the train in time to avoid the collision.

The loan of the push-car by the company's agent to persons not accustomed to its use was a species of carelessness, nay, recklessness, with which we did not suppose a faithful and competent agent could be chargeable. When the agent loaned it, he knew it was in violation of his instructions, the result of which might be great pecuniary loss to his employers. His wrong act was, in part, the cause of this disaster and life-long injury. But above and beyond this, the conduct of the engine-driver in charge of the express train admits of no justification or palliation. It is impossible to believe he did not see the signals excited persons were making, warning the driver of danger; and it is beyond all controversy he could, if he had been ordinarily careful, have stopped the train in time to avoid collision with the push-car, which was in plain sight for more than a mile. The fact that he supposed the push-car was under the conduct of section-men, who would take it off the track on the approach of a train, is no justification for his recklessness in crushing it to pieces. He should have known the car was not under the control of railroad employees, by the fact they did not attempt to remove it from the track on the signal being given. Not attempting it, the driver should at once have slackened speed, and broke up the train. This he could easily have done, and it was negligence of the grossest kind in omitting it, and for the consequences the company must be responsible. A railroad company has no right to keep in its service such a reckless man.

It is also made a point by appellants that the court erred in refusing to give instructions moved by them, numbered 2, 3, 4, and 11.

The substance of No. 11 was contained in the eighth instruction given for appellants, and the other instructions above specified were properly refused. Instruction numbered 2 leaves out of view negligence of their employees in running the train. Even if the child was a trespasser on the right of

way, the driver had no right to run over him and crush him. Instruction 3 is liable to the same criticism, and so is No. 4.

Perceiving no error in the record, the judgment must be affirmed.

Judgment affirmed.

PARENTS' NEGLIGENCE, WHEN IMPUTED TO CHILD: *Lafayette etc. R. R. Co. v. Huffman*, 92 Am. Dec. 318, and note 321; *Pittsburgh etc. Ry Co. v. Vining*, 92 Id. 269; *Sheridan v. Brooklyn & N. R. R. Co.*, 93 Id. 490.

PERSON KILLED UPON RAILROAD TRACK MUST BE SHOWN to have been rightfully there: *Lafayette etc. R. R. Co. v. Huffman*, 92 Am. Dec. 318, and note 322.

MASTER IS LIABLE TO THIRD PERSONS FOR NEGLIGENCE OR MISCONDUCT of his servant within scope of his employment: See *Zulbee v. Wing*, 91 Am. Dec. 425, and cases cited in the note 423.

COMMERCIAL INSURANCE CO. v. MEHLMAN.

[43 ILLINOIS, 312.]

OTER IS NEVER GRANTED OF INSTRUMENTS NOT UNDER SEAL.

CORPORATIONS ARE ENTITLED TO CHANGE OF VENUE EQUALLY WITH INDIVIDUALS.

ANY RECOGNIZED OFFICER OF CORPORATION MAY MAKE REQUISITE AFFIDAVIT upon application by the corporation for a change of venue, he being regarded as a party to the record *pro hac vice*.

CORPORATION IS TO BE REGARDED AS "PARTY" WITHIN STATUTE AUTHORIZING "parties" to obtain change of venue, by virtue of a statute declaring that the word "person" or "persons," as well as all words referring to or importing persons, shall be deemed to extend to and include bodies politic and corporate as well as individuals.

STIPULATION IN INSURANCE POLICY THAT SALTPETER SHALL NOT BE KEPT ON PREMISES is violated and the policy avoided if the assured kept saltpeter in a keg on sale as an article of merchandise.

ERECTION OF ADDITIONAL BUILDING ON INSURED PREMISES WILL NOT AVOID POLICY which contains the condition that "any change within the control of the assured, material to the risk, without permission herein, shall avoid this policy," and further provides that it shall be optional with the company to terminate the policy if the risk be increased by the erection of buildings. The "change" alluded to refers to change in police regulations made to prevent accidents from fire.

INSTRUCTION IN ACTION ON INSURANCE POLICY THAT IF COMPANY KNEW CHARACTER OF BUSINESS to be carried on, when it issued the policy, it must be held to have taken the risks usual in that business, is erroneous as tending to mislead, where the defense was that the assured kept saltpeter on the premises in violation of the conditions of the policy, and the proof showed not only that it was of doubtful necessity for the assured to keep any saltpeter on the premises to carry on his business, and unreasonable to keep a keg of it, but also that he kept it on sale.

ASSUMPSIT. The opinion states the case.

A. C. Story, for the appellants.

J. V. Le Moyne, for the appellee.

By Court, BREESE, C. J. This was an action of *assumpsit* on two policies of insurance, brought by John C. Mehlman against the Commercial Insurance Company in the superior court of Chicago, at the April term thereof, 1886.

One of the policies was dated September 11, 1865, for six hundred dollars upon the plaintiff's "one-story frame building," the other dated the 9th of October, 1865, for one thousand dollars, "upon his stock of groceries and provisions," and four hundred dollars "upon his stock of meat."

Both policies contain this condition:—

"This policy shall be vitiated by keeping gunpowder, saltpeter, fire-works, naphtha, benzine, camphene, turpentine, burning-fluid, spirit gas, crude oil or petroleum, or refined coal or earth oils, or kerosene, in quantities exceeding five barrels, or any other articles subject to legal or police restrictions, on the premises, without written consent hereon; or for neglect or deviation from any of the laws or police regulations made to prevent accidents from fire; any change within the control of the assured, material to the risk, without written permission hereon, shall avoid this policy."

There were two counts in the declaration, to which defendants pleaded the general issue, and eleven special pleas, on all which issues of fact were made up. The defendants then presented their petition, subscribed and sworn to by their secretary, who stated in his affidavit that he had the control of the case, and had employed the counsel for a change of venue, on the ground that the inhabitants of Cook County were prejudiced against the company, and for that reason they could not expect a fair trial of the cause in that county. The petition states that defendants had no knowledge, and did not hear or learn, of the existence of those facts and prejudice until Thursday, the seventh day of June, 1866, nor did knowledge thereof come to any of the attorneys or officers thereof until that time. They therefore prayed that an order might be made, changing the venue to the circuit court of some county where the causes complained of did not exist, etc.

The court refused the petition, to which the defendants excepted. A jury was sworn, and a verdict rendered for the

plaintiff. A motion for a new trial was overruled, and judgment rendered on the verdict, to reverse which defendants appeal to this court.

The first point made by appellants, assigning error on the refusal of the court to grant over prayed of the policies, has no foundation, as over is never granted of instruments not under seal.

The next point is the refusal of the court to award a change of venue on the affidavit of the secretary of the company.

It is insisted by the appellee that the application for a change of venue was discreditable to the company, a rich and powerful corporation, litigating with a poor man not possessed of the means required to convey his witnesses to another county. The same may be the case when a rich man is contending at law with a poor man,—either can avail of the law, irrespective of the hardships that may ensue. Appellee insists that the application was not sufficient under the statute; first, because it was not made by the defendants, but by an agent, and cites the case of *Crowell v. Maughs*, 2 Gilm. 421 [43 Am. Dec. 62], in which an agent of the party petitioning for a change of venue made the application and affidavit. The court said, and very properly, that the statute only authorizes the parties to obtain a change of venue, and the application must be made by a party to the record, the petition being verified by his affidavit. The statute does not include persons out of the record, nor allow them to swear to the petition as agents or otherwise.

It will be well to consider this objection in connection with the second made by the appellee, which is, that the law did not intend such an application should be made by a corporation.

These are the several objections urged by appellee against the application for a change, and if valid, very important interests of the state, the corporate interest, are in a degree outlawed. Why should not corporations have the same privilege of protection from prejudice as a natural person? Are their chartered rights and pecuniary interests less to be regarded than those of the individual? If so, why so? No good reason can be assigned why corporations should not have the benefit of this law equally with individuals. It is true, they are not expressly embraced by name in the statute, but courts sit to administer the law, as well in its spirit as in its words. Parties to a suit, either party, may make the applica-

tion. This corporation is one party, and the only real question is, How, being a party, can it make the requisite affidavit?

We have no decided case in point, but we know a corporation can only act by its officers and agents, and the spirit and reason of this law would require us to regard a recognized officer of a corporation as a party *pro hac vice*. Suppose a corporation is sued or suing, desires a continuance, or is summoned as a garnishee in a case, who but an officer of the company having charge of its business could make the affidavit in the first case, or answer interrogatories in the other? And we are not without authority in regard to the last proposition. In the case of *Oliver v. Chicago etc. R. R. Co.*, 17 Ill. 587, which was where a judgment had been recovered before a justice of the peace against the company, and an appeal taken to the circuit court, the only question considered was whether the answer made by the garnishee was sufficient. The court say the garnishee was a corporate company, created by the laws of this state, necessarily performing all its functions and acts through its agents and representatives. The answer was signed by Mr. Hall, the secretary and treasurer of the company, and under its corporate seal, but was not sworn to by any one. This was not a compliance with the statute; that requires the answer to be sworn to in all cases. And the court say: "In this case, it is true, the corporation could not in person swear to the answer; but it could have been sworn to by the proper officer or agent of the company knowing the facts, which would have been a substantial compliance with the statute." The same reasoning will apply in this case.

This court has decided that an action for assault and battery will lie against a corporation: *St. Louis, Alton, and Chicago R. R. Co. v. Dalby*, 19 Ill. 353. Would it not be an intolerable hardship and gross injustice to a corporation thus sued in the home court of the party injured, and he possessing great influence in his county, personal and otherwise, that the corporation should be deprived of the right to take the suit to another county, where the parties would be upon more equal grounds, where this influence did not prevail? No party to a suit can be deprived of the benefit of this law, if it is administered in its spirit. There is no doubt that in very many cases these applications are made for sinister purposes; but that is a fact and an argument for the law-making power. Courts must administer the law as it is, according to its letter, spirit, and obvious meaning and intention.

But this reasoning is, perhaps, unnecessary, as the statute referred to by appellants covers the whole ground. In chapter 90, Scates's Compilation, 722, section 29, it is declared that the word "person" or "persons," as well as all words referring to or importing persons, shall be deemed to extend to and include bodies politic and corporate as well as individuals.

The word "parties," in the venue act, refers to and imports persons most certainly, and includes this corporation.

This point is well taken by appellants.

Appellants further insist that an avoidance of the policy was shown by the proof that appellee kept saltpeter in the building, contrary to the express terms of the policy.

To rebut this, appellee proved it was customary in meat-houses to keep saltpeter, to be used in the preservation of meats, — from one fourth to one pound a month being usual for such purpose.

Admitting this, and that such custom can overrule the terms of the policy, the proof goes much further, and establishes the fact that the assured kept it in a keg on sale, as an article of merchandise. This was clearly in the face of the policy, and vitiated it. Whether saltpeter will explode or not may be a vexed question, and whether dangerous or not is immaterial; the agreement was, that the assured should not keep it, and if he did, the policy should be vitiated, and he must be held to the agreement. In the case of *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530, where one of the conditions of the policy was, "camphene cannot be used in the building unless by special permission in writing," etc., and defendants proved that camphene had been used in the building, but it was shown it had been taken out before the fire, it was held that the clause was a prohibition forming a part of the contract of insurance, and if violated, whether that affected the risk or not, the policy was avoided, and it was immaterial whether the subject of the breach continued up to the time of the loss or not. The same point was decided in *Westfall v. Hudson River Fire Ins. Co.*, 12 Id. 289.

Where it was known to the insurance agent at the time the policy was effected that the assured kept a prohibited article, and intended to keep it, in the building insured, the keeping it would not render the policy void, whether permission to keep it was indorsed, or intended or neglected to be indorsed: *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202.

As to knowledge in this case, it may be conceded the agent

knew a small quantity of saltpeter was kept in every meat-shop, a few ounces of which were used monthly to preserve the meat. It was proved, however, he had a keg of it nearly full, and dealt in it, on one occasion at least, as an article of merchandise. This avoided the policy. It is absurd to say such a contract can be entered into and its terms avoided, or evaded at the will of one of the parties without the consent of the other.

It is further objected by appellants that the policy was vitiated in another respect, and that was in the erection of the shed on the rear of the insured premises, in which he kept a stove and kettle which he used for cooking sausages and rendering lard. This shed, with its appurtenances and uses to which it was applied, it is contended, was an important change in the condition of the premises, wholly within the control of the assured, and, as was proved by practical firemen, material to the risk, that being increased thereby.

Reference is made in support of this point to this clause in the policy which closes the particular statement of the clauses which shall vitiate the policy, a part of which, relating to gunpowder and saltpeter, we have quoted, and concludes, "any change within the control of the assured material to the risk, without written permission herein, shall avoid this policy." What "change" is here alluded to, or was in contemplation of the parties, is not entirely clear; but interpreting it by the position in which the clause is found, and its connection with the previous part of the sentence, we must suppose that change in police regulations, made to prevent accidents from fire, and which the assured might control, and material to the risk, would, without the written permission of the assurer, avoid the policy. It could hardly mean a change in the condition of the premises by the erection of buildings on the premises, for that is distinctly provided for in a subsequent clause of the policy, reading thus: "If during the insurance the risk shall be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise, or if the company shall so elect, it shall be optional with the company to terminate this insurance at any time by giving notice to the assured or his representatives of its intention to do so, and returning or offering to return the unearned premium."

It would seem from this provision an avoidance of the policy did not follow the erection of this shed, although the risk was

thereby increased. The company had their election by reason thereof to terminate the policy on notice to the assured.

The next point made by appellants is upon the instructions.

The appellants complain that the first nine instructions asked by them were refused. Perhaps the eighth and ninth should have been given, but as the court gave instructions marked 1, 2, and 3, for defendant, they sufficiently stated the law as applicable to the case, and no injury has been done appellant by refusing the eighth and ninth instructions.

It is complained, also, by appellants that the instructions given for plaintiff, marked 4, 5, and 6, were wrong, and should not have been given.

The fourth instruction is as follows:—

“4. If the insurance company knew the character of the business the plaintiff intended to carry on, and with such knowledge made the policies, they must be held to have taken the risks usual in that business; and if the jury believe from the evidence that the plaintiff did keep saltpeter on the premises in question, this is not a good defense to this action, if the jury believe from the evidence that said article is generally and necessarily used in the business he was carrying on, and that the quantity kept was not unreasonable for such use.”

This instruction, under the testimony given, was well calculated to mislead the jury, for, though it may be true an insurance company, knowing the business of the assured, calculates the risk usually attendant on the business, and though the assured may keep articles necessary to carry on such business, though proscribed by the policy, it is not true he may keep them for sale. The proof in this case, by Mary Thaler, was, that she had bought saltpeter there; it was kept in a keg, and was pretty full when she bought some. George Petermichle says he is a butcher, and sold beef to plaintiff, and says the plaintiff's business was that of a butcher, in which he is contradicted by all the facts in the case, and by plaintiff's own representations in effecting the policy. He did not butcher meats, but kept a meat-shop, where meats were sold. In answer to the question, if it was necessary for a meat-market ordinarily to have saltpeter on the premises, he answered: “Every butcher must keep saltpeter”; and in stating the purpose for which it is kept, he said: “Saltpeter is used to keep meat longer”; and concludes by saying plaintiff kept groceries and a meat-market. Thomas Webb said he was a butcher, and that saltpeter is not necessary in a meat-store,

but we use it to give redness and firmness to the meat. In an ordinary butcher-shop he would use about a pound a month. In my market, I don't use that much, take the year round. Now, I don't use more than half that quantity.

William Stanly is a butcher, and he said he did not think saltpeter was a necessary article in a butcher's shop, but as a general thing butchers use it more or less; he used in his shop five or six cents' worth a month,—about four ounces; does as much business as any shop on the West Side; does not think it necessary to keep a keg of it on hand.

As the court, in the instruction, did not define what was a reasonable quantity of saltpeter to be kept on hand, the jury should have looked to the testimony, where they would have found that it was of at least doubtful necessity to keep any on hand, and certainly quite unreasonable, and in violation of the policy, to keep a keg of it, and that, too, as an article of merchandise. This instruction should not have been given in the terms in which it was given.

The most of the above considerations will apply to the fifth instruction, and it should not have been given without explanation.

The sixth instruction refers to the provision in the policy, that the plaintiff might complete the buildings, the risk, when taken, being only a carpenter's risk, and it tells the jury the plaintiff had a right to complete it in the usual way, without defining what that way was, and in the absence of all proof on that point. The whole instruction is calculated to mislead; for, starting out on the hypothesis that the main building, which was all the building that was insured by either policy, was the one he had a right to complete in a reasonable time, it closes by telling the jury it is for them to say, from the evidence, whether the shanty or shed was fairly to be considered as a part of the work of completing, not the building then in course of erection, but "the premises," under which general and comprehensive term might be included a dozen buildings on the same lot of ground. But, as we have before said, if the erection of this shed increased the risk, all the remedy given by the policy was to notify to the assured the election of the company to terminate the policy, and as that was not done, the company, by their own agreement, took the hazard.

Entertaining these views of the case, the judgment must

be reversed, for the reasons given, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

INSTRUCTIONS TENDING TO MISLEAD SHOULD NOT BE GIVEN: *State v. Benham*, 92 Am. Dec. 417.

CHANGE IN INSURED PREMISES AS AVOIDANCE OF POLICY: See *Gilliat v. Pawtucket etc. Ins. Co.*, 91 Am. Dec. 229, and note 234.

AVOIDANCE OF POLICY BY BREACH OF CONDITION AGAINST KEEPING HAZARDOUS ARTICLES ENUMERATED THEREIN: See *Phoenix Ins. Co. v. Lawrence*, 81 Am. Dec. 521, and note 530.

CORPORATION IS ENTITLED TO CHANGE OF VENUE: Note to *Shattuck v. Myers*, 74 Am. Dec. 242, citing the principal case. The principal case is cited to the point that where a corporation, seeking a change of venue, complies with the requirements of the statute, the court has no discretion in the matter, but must award the change: *Knickerbocker Ins. Co. v. Tolman*, 80 Ill. 107.

ROZET v. McCLELLAN.

[48 ILLINOIS, 345.]

PLEDGEES WHO TAKES SHARES OF CORPORATE STOCK AS COLLATERAL SECURITY for a promissory note, with authority to sell in case of the non-payment of the note, is not bound to sell upon default in the payment of the note, and is not liable for a loss occasioned by a depreciation in the value of the stock occurring after the default.

MAKER OF NOTE WHO TOOK AS CONSIDERATION THEREFOR CHECK FOR TEN THOUSAND DOLLARS, and not for so many confederate dollars, and deposited it in bank to his credit, cannot show in defense to the note that the check was paid in confederate money; for if he received anything but lawful money of the United States, he did so at his own risk.

ACTION on promissory note. The opinion states the case.

Storrs and Johnson, for the plaintiff in error.

Bailey and Magruder, for the defendant in error.

By Court, WALKER, J. In December, 1861, appellant and one Paul Queyrouse were engaged in conducting a corporation styled the Southern Shoe Manufacturing Company, in the city of New Orleans, of which appellant was president and Queyrouse secretary. About the 5th of that month appellee purchased of appellant fifty shares of stock of the company, which appellant sold to him on the condition that appellee would lend appellant five thousand dollars. Appellee drew his check on the Citizens' Bank of New Orleans, and received the shares of stock and appellant's note at four

months, for the money thus loaned. The check was payable to the order of appellant, and by him indorsed, and also by his firm, and deposited to their credit in the American Bank at New Orleans.

When the note matured, appellant was unable to meet it, and it was renewed by giving the note sued upon in this case, and transferring fifty shares of the stock to appellee as collateral security, and authorizing him to sell it at public or private sale, in case of the non-payment of the note, and to apply the proceeds in discharge of the note. On the maturity of the note, appellee failed to sell the stock, and it declined in value, and that is insisted upon as a defense in this action.

The agreement of the parties empowered appellee to sell, but did not in terms require him to sell. Had he exercised the power by giving notice to appellant to redeem or he would sell, and he had failed to do so, and a sale had been made, there can be no doubt that the title would have passed to the purchaser, and the right of redemption by appellant would have been cut off and ended. Story, in his work on bailments, page 311, section 308, says that, under the common law, the right to sell the pledge results from the default of the pledgor in complying with his engagement. But such a right does not divest the general property of the pawnor, but still leaves him a right of redemption. And if the pawnor neglects or refuses to redeem the pawn, upon due demand and notice, the pawnee may have the pawn sold. It then follows that the title to the stock did not vest in appellee upon the default in payment by appellant. The general title remained the same as before the default, still subject to redemption. The right of sale in case of a pledge differs from other liens, as in other cases such right does not usually exist.

The question then presents itself, whether appellee was bound to sell this stock on the occurrence of the default, and on failing to do so, whether he has rendered himself liable to account for the loss? We have been referred to no authority announcing such a rule, nor have we been able to find any case that goes that length. The cases of *Slevin v. Morrow*, 4 Ind. 425, *Roberts v. Thompson*, 14 Ohio St. 7, and *Jennison v. Parker*, 7 Mich. 355, cited in appellant's brief, hold the doctrine that the pledgee is bound to use reasonable diligence in the collection of negotiable paper pledged as collateral security; but do not hold that it is the duty of the pledgee to sell prop-

erty thus pawned. And as the rule is firmly established that the pledgee must make a demand, and give notice before he can sell the pledge and bar the redemption, it would seem to follow that he was not bound to sell. And under the ancient common law, it required a judicial proceeding to authorize the sale, or at least to cut off the right of redemption: Story on Bailments, p. 312, sec. 310. The mortgagee, by delaying to sell the property upon which he holds a mortgage, does not incur liability for loss by its depreciation, and the pledgee, not being required to sell, should not be subjected to the loss.

The pledgor having the general property in the pledge may sell it, and compel its restoration upon paying the money to redeem. Had appellant found a purchaser of the stock, who had tendered the amount of the note, and appellee had refused to deliver it to him as the purchaser, on the order of appellant, then a very different question would have been presented for our consideration. In this, appellant has presented no defense.

It is urged that the consideration of the note was for confederate money, or rather that the check was paid in such money, and that the court below erred in not permitting appellant to show that fact. It appears that the check was drawn for ten thousand dollars, not for so many confederate dollars, and it was deposited with a bank; and it can make no difference whether it was received in one kind of money or another, or whether it was passed to appellant's credit, as it was for lawful money, and it was a matter of choice if appellant received anything but money which was a legal tender under the laws of the United States. If on presentation confederate money had been tendered, appellant should have refused it, and compelled the payment of lawful money, or returned the check. This renders it unnecessary to determine whether confederate money would form a consideration to support a note. The judgment of the court below is affirmed.

Judgment affirmed.

DEFENSE OF WANT OF CONSIDERATION WHEN CONFEDERATE NOTES ARE CONSIDERATION OF PROMISSORY NOTE: See *Potts v. Gray*, 91 Am. Dec. 294; *Healy v. Franklin*, 91 Id. 296, and notes. See also *Cox v. Smith*, 90 Id. 476, to the point that a note is valid as founded on sufficient consideration where, for a loan of fifteen hundred dollars in gold coin, made at a time when that amount of gold would be worth two thousand five hundred dollars in paper currency, the note was executed for two thousand five hundred dollars, without specifying in what kind of money it was payable.

POWERS AND DUTIES OF PLEDGER OF HYPOTHECATED STOCK WITH RESPECT TO SALE THEREOF: *Maryland Fire Ins. Co. v. Dalrymple*, 89 Am. Dec. 779, and note 791; *Bryson v. Rayner*, 90 Id. 69; and the note to *Robinson v. Hurley*, 79 Id. 499-506.

WOOD v. KINGSTON COAL COMPANY.

[48 ILLINOIS, 355.]

DAMAGES FOR BREACH OF WARRANTY OF TITLE OF LAND includes purchase-money paid, with six per cent interest thereon for five years before the eviction, and afterwards to the time of the recovery on the covenant, if the plaintiff is liable for mesne profits; for the possession and profits of the land are presumed to be equal to the interest on the purchase-money, and as the grantee is liable for mesne profits only for five years before the eviction, his recovery of interest will be limited to that period.

STATUTE OF LIMITATIONS NEED NOT BE PLEADED IN ORDER TO RESTRICT RECOVERY OF INTEREST by grantee suing for breach of warranty of title to a period commencing five years before the eviction, as the question is merely of the measure of damages, not of the limitation of the action.

EXCESS OF INTEREST CANNOT BE REMITTED IN APPELLATE COURT; for that court cannot alter or amend the records of inferior courts.

CORPORATE EXISTENCE OF PLAINTIFFS IS SHOWN BY EVIDENCE THAT DEFENDANT sold and conveyed to them the land in controversy, and thereby recognized their corporate existence.

COVENANT. The opinion states the case.

McCoy and Stevens, for the appellant.

Wead and Jack, for the appellees.

By Court, WALKER, J. This was an action of covenant, brought by appellees in the Peoria circuit court, against Chauncey C. Wood, on the covenants contained in a deed executed by the latter to the former. The declaration avers that the deed was made, and contained a covenant of general warranty of the title; that a suit was instituted in the circuit court of the United States in ejectment, by Francis A. Wilson, against appellees, and that the premises thus conveyed were recovered on a trial of the action, and appellees evicted therefrom. To the declaration several pleas were filed, upon which issue was joined. A trial was subsequently had, resulting in a judgment in favor of appellees. And the case is brought to this court on appeal, and a reversal is urged upon the alleged ground of a misdirection of the jury by the court below.

The instruction given for appellees, and to which an exception is taken, is the first in the series asked by them, and is this:—

"If the jury believe, from the evidence, that the defendant executed the deed to the plaintiff, and that the plaintiff has been ousted from the possession of the land therein described by virtue of an older and better title, the plaintiff is entitled to recover the amount of the consideration named in said deed, with interest thereon from the date of the deed to the present time at six per cent."

In the case of *Harding v. Larkin*, 41 Ill. 413, it was held that on a breach of a covenant of general warranty of title, the true measure of damages was the purchase-money, with six per cent interest for five years prior to the eviction, if the grantee was liable for mesne profits; that the action for mesne profits, being an action of trespass, and that the limitation of that form of action applied by analogy to a recovery of this character; that the recovery of mesne profits always followed a recovery in ejectment, and was in trespass, and that our ejectment law had given a suggestion in the nature of that action and for the recovery of mesne profits, as a continuation of the suit in ejectment, which followed the judgment for the recovery of the land; that if the action was either trespass or the suggestion in ejectment for the recovery of such profits, the statute of limitations barred a recovery for a longer period than five years before the recovery; and that as the law indulged the presumption that the possession and profits of the land purchased were equal in value to the interest on the purchase-money, that on the failure of title, the grantee, having enjoyed the use of the land from the date of his deed, could not recover interest on the purchase-money except for the period of time he was liable for mesne profits. This rule is applicable to improved and productive land, but perhaps would not apply to vacant and unproductive real estate, to which the title had failed.

At the ancient common law, under the writ of *warrantia chartæ*, the demandant recovered only the value of the land at the time the warranty was made, although the land may have increased in value from natural or other causes: Reeves's Eng. Law, 448. This compensation was made in lands by the warrantor, or his heir, if he inherited from his ancestor, of equal value to the land from which the feoffee was evicted: Glanville, c. 4, sec. 3; Bracton, 384 a, b. While this rule prevailed in England, yet, under the early feudal law on the continent, the lord was bound to recompense his vassal, on eviction, with other lands of equal value to that from which

he was evicted, at the time of eviction. But this rule, so far as we can ascertain, never obtained in the common law of England; nor did the change introducing personal covenants alter the rule as to the amount of the recovery. In warranties on the sale of chattels the rule is the same: *Fielder v. Starkin*, 1 H. Black. 17.

While originally the purchaser only recovered the purchase-money paid, without interest, yet after the introduction of the action for mesne profits; which takes from the purchaser, on eviction, the profits of the land, the rule was adopted allowing him interest in lieu of such profits; and the rule is now established that he may recover interest so long as he is liable for mesne profits, and we have seen that is from the time of a recovery on the covenant back to five years before the eviction, if the grantee is liable for such profits: *Staats v. Ten Eyck*, 3 Caines, 111 [2 Am. Dec. 254]; *Caulkins v. Harris*, 9 Johns. 324; *Bennet v. Jenkins*, 13 Id. 50.

It is, however, urged that, as the statute of limitations was not interposed, this question does not arise on the record. Had the action been barred by the statute, to have availed of it, the plea should have been interposed. But there is no pretense that the action is barred in this case. There is nothing appearing from which it can be inferred that any portion of the cause of action was barred. The breach of the covenant occurred within the period of sixteen years. This is only a question of the measure of damages, — simply for what period of time interest shall be computed on the purchase-money in assessing the damages; and the appellees should be confined to five years before the eviction, and up to the time they recovered on the covenant, if they were liable for mesne profits. In the case of *Caulkins v. Harris*, *supra*, the action was on a covenant in the deed, and only the plea of *non est factum* was filed, and in the court below interest was allowed from the date of the deed until the recovery in the action of covenant; but the judgment was reversed, the court, on appeal, only allowing interest for six years. In that case, the plea of the statute of limitations was not interposed. The court below, in this case, therefore, erred in giving appellees' first instruction.

Appellant endeavors to obviate the effects of the error by offering to remit the excess of interest in this court. We are aware of no case in which the record of the court below has ever been altered or amended in this court. The several courts in our state have exclusive control over their records;

and it is not the province of this court to alter or amend the records of inferior tribunals. This court, in the cases of *Pickering v. Pulsifer*, 4 Gilm. 79, and *Chenot v. Lefevre*, 3 Id. 643, refused to permit the entry of a *remittitur*, and we are not disposed to depart from the former practice of the court.

There is evidence in the record to prove the corporate existence of appellees. Appellant sold and conveyed to them the land, and thereby recognized their corporate existence. This of itself would be sufficient evidence on this plea from which the jury might infer that they were acting as a corporate body, independent of the other evidence.

The judgment of the court below must, however, be reversed, and the cause remanded.

Judgment reversed.

RECOVERY OF DAMAGES UP TO DATE OF VERDICT: See *Cook v. England*, 92 Am. Dec. 618, and note treating this subject 627-632.

AMENDMENTS AFTER APPEAL: See *Hooper v. Wells, Fargo, & Co.*, 85 Am. Dec. 211, and note 230.

MEASURE OF DAMAGES FOR BREACH OF WARRANTY OF TITLE TO LAND is the purchase-money, with interest: *Phillips v. Reichert*, 79 Am. Dec. 463, and note 467.

THE PRINCIPAL CASE IS CITED in *Ringhouse v. Keener*, 63 Ill. 235, where it is said that the filing of the suggestions for a recovery of mesne profits constitutes the commencement of the suit; and though the plaintiff delay a year or more after his recovery in ejectment, all rents and profits are barred which accrued more than five years prior to the filing of the suggestions; and the principal case is not authority to the effect that the period of limitations necessarily runs from the recovery in the ejectment suit.

CITY OF GALENA v. CORWITH.

[45 ILLINOIS, 422.]

PROVISION OF CHARTER OF CITY AUTHORIZING IT TO BORROW MONEY, and to issue bonds therefor, and to expend the money in the liquidation of its debts and in improvements, does not prohibit it from funding its existing debt, and issuing bonds therefor, or giving written evidences in any form the parties may agree upon.

MUNICIPAL CORPORATIONS HAVING POWER TO CONTRACT DEBTS MAY PROVIDE FOR THEIR PAYMENT without express authority of charter, in such mode as they and the holders of the indebtedness may agree upon; and they may fund their debts, if that be deemed the best policy, and issue the necessary evidences thereof.

CORPORATIONS HAVE ALL POWERS OF ORDINARY PERSONS AS RESPECTS THEIR CONTRACTS, except when they are expressly or by necessary implication restricted; and they have all the powers necessary to carry out powers expressly granted.

DEBT by Corwith against the city of Galena, upon two bonds issued by the defendant. The pleas were the general issue, want of consideration, and that the city had no authority to issue the bonds. The verdict was for the plaintiff; and a motion for a new trial being overruled, and judgment rendered on the verdict, the defendant assigned error.

Louis Shissler, for the plaintiff.

D. W. Jackson, for the defendant in error.

By Court, BREESE, C. J. It is insisted by the plaintiff in error that inasmuch as the charter of the city of Galena granted the power to borrow, upon the faith and pledge of the city, so much money as they might deem necessary and expedient, not exceeding twenty thousand dollars in any one year, and to issue bonds, scrip, or certificates therefor, and that the money so borrowed to be expended and applied in liquidation of the debts of the city, and in the permanent and useful improvement thereof, that thereby the city is prohibited from funding its existing debt, and giving written evidence thereof, either by bonds bearing interest and on long time, or in any other form the parties might agree upon.

One single question will, we think, settle the present difficulty. The power in the charter to borrow this money permits it to be expended in the useful and permanent improvement of the city. Now, suppose the whole amount is borrowed, and all expended in improvements, has the city no power to provide for its existing debt, which may be twice twenty thousand dollars?

Every corporation, or every natural person, has the undeniable and inherent right to pay its debts, or provide for their payment,—to fund them, if that be deemed the best policy, and issue the necessary evidences thereof. It will not be denied, municipal corporations have power to contract debts, and without limit, unless restricted by their charters. Having this power, it follows they can provide for their payment, in such mode as they and the holders of the indebtedness may agree upon.

We believe it to be well-settled doctrine that corporations have all the powers of ordinary persons, as respects their contracts, except when they are expressly or by necessary implication restricted; and that they have all the powers necessary to carry out an expressly granted power.

The right bestowed by the charter to borrow by no means

nullifies the power, vital to every corporation, to pay its debts or provide for their payment by postponing the payment to a future day, and issuing evidences thereof. We do not think the citation of any authority necessary to establish a proposition so plain. A city being in debt, which is evidenced by scrip or by promissory notes, may surely change the form of the indebtedness to interest-bearing bonds, and this without any express authority in its charter. It is an inherent power and vital, without which such organizations could not live.

These views dispose of the instruction which was objected to by plaintiff in error, and given by the court for defendant in error.

The evidence offered by the plaintiff in error was properly ruled out, as it had nothing whatever to do with the merits of the case. If the scrip was lawfully issued, which is not denied, no matter what their depreciation may have been, the bonds given in place of them must be paid at their face. The city must pay as it is "nominated in the bond."

There being no error in the record, the judgment is affirmed.
Judgment affirmed.

MUNICIPAL CORPORATIONS CAN EXERCISE ONLY THOSE POWERS EXPRESSLY GRANTED by charter, and such as are necessarily incidental: *Clark v. City of Des Moines*, 87 Am. Dec. 423, and note 440; *Caldwell v. City of Alton*, 85 Id. 282.

IMPLIED POWER OF MUNICIPAL CORPORATION TO BORROW MONEY AND ISSUE BONDS: See *Clark v. City of Des Moines*, 87 Am. Dec. 423, and cases cited in the note 441. The principal case is cited to the point that a municipal corporation has the right to pay its debts, or provide for their payment, to fund them, if that be deemed the best policy, and issue the necessary evidences thereof: *Smith v. Peoria County*, 59 Ill. 424; *Village of Hyde Park v. Ingalls*, 87 Id. 13; *Bissell v. City of Kankakee*, 64 Id. 250; *Burr v. City of Carbondale*, 76 Id. 474. But in *County of Hardin v. McFarlan*, 82 Id. 140, it is said, citing the principal case, that a city cannot issue bonds unless it has the power to borrow money, and is not restricted in the means of exercising this power. And in *Commissioners of Highways v. Newell*, 80 Id. 595, it is held that what is said in the principal case does not apply to the powers and duties of commissioners of highways; and see *Clark v. City of Des Moines*, 87 Am. Dec. 423, to the point that a city has no implied power to issue negotiable warrants.

CORPORATIONS MAY USE SAME INCIDENTAL MEANS TO ACCOMPLISH GIVEN PURPOSE that might be used by an individual, in the absence of restriction: *People v. River Raisin etc. R. R. Co.*, 86 Am. Dec. 64, and note 69. The principal case is cited to the point that where there is power in reference to the subject generally, a city may make all contracts, and do all acts that an individual may do: *City of Memphis v. Brown*, 1 Flip. 198; *Bicknell v. Widener School Township*, 73 Ind. 504. But see *Clark v. City of Des Moines*, 87 Am. Dec. 423.

FORTIN v. UNITED STATES WIND ENGINE AND
PUMP COMPANY.

[48 ILLINOIS, 451.]

ORIGINAL ARTICLES OF INCORPORATION PROPERLY RECORDED ARE ADMISSIBLE in evidence without a certificate of the clerk that the instrument is "a true copy."

JURY IS WARRANTED IN FINDING TWO DEFENDANTS JOINTLY LIABLE for the price of a pump purchased by one of them, where the evidence showed that they were jointly engaged in farming and stock-raising, that they were in the habit of purchasing goods and other property for the farm, which was charged to them jointly, and paid for sometimes by one and sometimes by the other, and that the pump was purchased for the use of their joint stock and for their mutual benefit, notwithstanding it was placed on the separate land of the party purchasing it.

ACTION for the price of a mill and pump by the appellees against the appellants, Thomas Fortin and his brother, who lived together and were jointly engaged in the business of farming and stock-raising. The defendant *inter alia* pleaded *nul tiel* corporation. In other respects the opinion states the case.

William H. Richardson, for the appellants.

M. B. Loomis, for the appellees.

By Court, WALKER, J. It appears from the record in this case that the certificate or articles of association offered in evidence was the original, and not a copy. It therefore could not have been truly certified to be a true copy by the clerk. It seems to have been recorded in the proper county, and no objection to its admission is perceived, and hence it was not error to admit it.

The main question in the case is, whether the finding of the jury, that appellants were jointly liable, is manifestly against the evidence. It appears from the evidence, and it was so stated by Thomas, that they purchased goods which were charged to them, and that sometimes one paid and sometimes the other; that they were jointly engaged in farming and stock-raising on the farm upon which the mill and pump were placed. It is true that Thomas was alone present when the purchase was made, and it was placed upon his land, and he states that each improved his own land. It would, however, seem to be manifest that it was purchased for the use of their stock and for their mutual benefit, and as a means of advancing their farming and stock-growing interests, which

were joint. And being in the habit of purchasing goods and other property for the farm, and either of them paying for it, and being in the habit of purchasing other property jointly, a jury might reasonably infer that, this being for joint use, it was purchased on their joint account, notwithstanding it was placed on the separate land of one of them. While it may be that the evidence is not of that clear and satisfactory character as would leave no doubt, still the evidence tended to show that the purchase was made on their joint account, as was their constant habit of purchasing other property.

We are of the opinion that there was evidence to warrant the finding of the jury, and the judgment must be affirmed.

Judgment affirmed.

WHETHER CONTRACT IS JOINT OR SEVERAL IS PROPERLY QUESTION FOR JURY, where it depends not only on the construction of several written instruments, but also upon oral evidence: *Bradford v. South Carolina R. R. Co.*, 62 Am. Dec. 411.

MARSHALL v. CHICAGO AND GREAT EASTERN RAILWAY COMPANY.

[40 ILLINOIS, 475.]

DYING DECLARATIONS OF PERSON KILLED ARE NOT ADMISSIBLE TO CHARGE DEFENDANT, in an action against a railroad company, for negligence in causing the death.

DYING DECLARATIONS OF PERSON KILLED ARE NEVER ADMISSIBLE, EXCEPT IN PUBLIC PROSECUTIONS for felonious homicides.

CASE. The opinion states the facts.

E. Walker, for the appellant.

Hervey, Anthony, and Galt, for the appellees.

By Court, BRESEE, C. J. The only question of any real importance presented by this record, which we are disposed to discuss, is, Were the dying declarations of the boy admissible in evidence to charge the defendant?

The action was case, to recover damages for death occasioned by the careless management of a railroad locomotive. and brought by the father of the boy killed, as his next of kin and personal representative.

This is a new question in this court, and quite an interesting one, which we lack time to discuss at any great length. A few principles of evidence will be noticed, and such opin-

ions as text-writers on evidence or courts of justice may have declared on the point.

The general rule is, that hearsay evidence—that is, statements coming from one not a party in interest, and not a party to the proceeding, and not made under oath—is not admissible, for the reason that such statements are not subjected to the ordinary tests required by law for ascertaining their truth, the author of the statements not being exposed to cross-examination in the presence of a court of justice, and not speaking under the penal sanction of an oath, with no opportunity to investigate his character and motives, and his deportment not subject to observation. And the misconstruction to which such evidence is exposed, from the ignorance or inattention of the hearers, or from criminal motives, are powerful additional objections.

There are, however, well-established exceptions to this rule; whether wisely so or not is certainly a grave question, and among them are dying declarations. These are understood to be statements made by a person under the immediate apprehension of death, and who did die soon after.

In 1 Phill. Ev. 215, it is said the declarations of a person who has received a mortal injury, made under the apprehension of death, are constantly admitted in criminal prosecutions, and are not liable to the common objection against hearsay evidence, partly for the reason that the awful situation of the dying person is considered to be as powerful over his conscience as the obligation of an oath, and partly on a supposed want of interest, on the verge of the next world, dispensing with the necessity of a cross-examination.

Without questioning the soundness of this last reason, obnoxious as it may be to fair criticism, it may be safely said the exception itself deprives an accused party of a most inestimable privilege secured to him by the ninth section of article 13 of our state constitution, "to meet the witnesses face to face," so that, by cross-examination, the truth may be eliminated. The exception is in derogation of common right, for, independent of constitutions and laws, an accused person has the right to have the witness who is to condemn him in his presence, so that he may be subjected to the most rigid inquisition. To hang a man on the statements of one who is on his dying bed, racked with pain, incapable in most cases of giving a full and accurate account of the transaction weakened in body and in mind, and though *in articulo mor-*

tis, harboring some vindictive feeling against him who has brought him to that condition, is, to say the least, and has always been, a dangerous innovation upon settled principles of evidence, and no court ought to be disposed to extend it to embrace cases to which it did not, in its inception, apply. The rule itself has no great antiquity to recommend it, it having been first declared by Lord Chief Baron Eyre, at the Old Bailey, in 1789, in *Woodcock's Case*, 1 Leach Cr. L. 500, in which the monstrous doctrine was held that, although the declarant did not apprehend she was in a critical state,—in momentary expectation of death,—soon to appear before the throne of the Eternal, and although the witnesses could give no satisfactory information as to the sentiments of her mind upon that subject, and the surgeon testifying that she did not seem to be at all sensible of the danger of her situation, and never saying whether she thought she should live or die, the court held, on its own conviction, that she was in a condition rendering almost immediate death inevitable, and as persons about her thought she was dying, her declarations, made under such circumstances, ought to be considered by the jury as being made under the impression of her approaching dissolution, when the case showed, by the most positive proof, she had no impressions upon the subject. Having no such impression, how could her conscience have been touched? The prisoner was convicted and executed, thus adding one more to the judicial murders which blacken the page of history. And this is the leading case in support of the exception.

To tolerate this exceptional rule, the declarant ought to be, at the time of making the declarations, under the impression of almost immediate dissolution, and without any hope of recovery. When that has departed,—when he is conscious he is in a moment to be among the dead, and his soul to take its flight from the body,—thus circumstanced, it might be said his declarations, understandingly made, were of equal force with his testimony delivered in a court of justice, and entitled to be received, and justly, were it not for the fact the accused was not present and had no opportunity to cross-examine him. The bed of death affords no opportunity for this, and the accused may become the victim of statements, which, by reason of the fading condition of the body, in which the mind must in some degree participate, of him who makes them, depriving them of that clearness, distinctness, and correctness

which should characterize them, and destitute of which, human life should not be sacrificed by them.

In looking into the books, we find that such declarations are restricted to cases of homicide,—not those resulting from accident or mischance, but felonious homicide.

The cases in England in which they were received, and not in cases of felonies, were the cases cited by appellee in *Wright v. Littler*, 3 Burr. 1244. The declarations admitted in that case were the confessions of the forger himself, made on his death-bed, and Lord Mansfield said he should admit them as evidence, but that no general rule could be drawn from it. The same was the case of *Aviston v. Lord Kinnaird*, 6 East, 195.

These two cases the learned author (Phillips on Evidence) thinks were overruled by the case of *Stobat v. Dryden*, 1 Mees. & W. 615, and are not supported by the deliberate judgment of any court, but that the disposition of courts was rather to restrict the admissibility of dying declarations, even in criminal cases.

The true foundation of the rule, that they were admissible in cases of felonious homicide, were policy and necessity, since that crime is usually committed in secret, and it cannot be allowed to such an offender to commit the crime, and by the same act still forever the tongue of the only person in the world which could speak his crime.

That they are not admitted in civil cases is held by most courts in this country and in England. The only case to the contrary is the one referred to by appellee as decided in North Carolina: *McFarland v. Shaw*, 2 Car. Law Rep. 102. This was a case for seduction, brought by the father, and he was permitted to give in evidence the dying declarations of his daughter, that the defendant was her seducer.

The leading case in this country against their admissibility in civil cases is *Wilson v. Boerem*, 15 Johns. 286, opinion of the court by Thompson, C. J., referring to the case of *Jackson v. Kniffen*, 2 Id. 35 [3 Am. Dec. 390], opinion by Livingston, J. The same rule was held in *Gray v. Goodrich*, 7 Id. 95, which appellee has cited, where it is said: "The law requires the sanction of an oath to all parol testimony. It never gives credit to the bare assertion of any one, however high his rank or pure his morals. The cases of pedigree, prescription, or custom are exceptions to this rule. What a deceased person has been heard to say, except upon oath, or *in extremis*, when

he came to a violent end, never has been considered as competent evidence." This clearly has no reference to a civil case, but to a criminal prosecution for a felonious homicide. See also *Kent v. Walton*, 7 Wend. 256.

We think it may be safely said that the rule at present prevailing in this country and in England on this subject is, that in no case, save that of a public prosecution for a felonious homicide, can dying declarations of the party killed be received in evidence, and to this extent, and no further, are we inclined to go.

In civil cases they are not admissible. To admit the dying declarations in this case was error, and for that error the judgment must be reversed and the cause remanded.

Judgment reversed.

DYING DECLARATIONS ARE NOT ADMISSIBLE PER SE in civil cases, but only when they form part of the *res gestæ*, or are against interest, and the like: *Barfield v. Britt*, 62 Am. Dec. 190; *Daily v. New York etc. R. R. Co.*, 87 Id. 176, and note 177; and see the note on the subject of *res gestæ* appended to *People v. Vernon*, *ante*, p. 49.

SHARP v. PARKS.

[48 ILLINOIS, 511.]

OWNER OF STOLEN PROPERTY MAY MAINTAIN ACTION FOR ITS VALUE against a person who has innocently bought it from the thief, and resold it in good faith, if the property itself has passed beyond the reach of the owner.

INSTRUCTION ASSUMING THAT THERE IS NO EVIDENCE TENDING TO ESTABLISH a proposition is not ground for reversal, if such is the case.

TROVER by Parks against Sharp, interpleaded with others, to recover the value of a quantity of wool, alleged to have been stolen from the plaintiff, and bought from the thief by the defendants, who resold it to other parties. Verdict for the plaintiff, and appeal by the defendants.

King and Scott, for the appellants.

W. D. Barry, for the appellee.

By Court, LAWRENCE, J. This record presents the question whether the owner of stolen property can maintain an action for its value against a person who has innocently bought it from the felon, and resold it in good faith, the property itself having passed beyond the reach of the owner. In *Hornord v.*

Smith, 2 Term Rep. 751, it was held such an action could not be maintained, but it was on the ground that there had been a sale in market overt, by which the title of the owner had been temporarily divested; and although the act of Parliament entitled him to a restitution of the goods upon prosecution of the felon to conviction, yet the court held such conviction gave him a new title against the person in possession, but did not give him an action against persons through whose hands the property had passed prior to the conviction, because they had held it under a valid title derived from the sale in market overt. This, at least, is the reasoning of Mr. Justice Buller. "When," he asks, "did the plaintiff's property begin in this case? Not till after the conviction of the felon, because before that time the property had been altered by a sale in market overt." The additional reasoning by Lord Kenyon, which is also urged in the present case, that if the plaintiff could maintain that action, he could recover, with equal propriety, against any one of the various persons through whose hands the goods may have passed, and that it cannot be conceived that he should have his action against so many, does not seem to us very satisfactory. If, upon principle, the owner should be permitted to sue, the fact that the recognition of such a principle would entitle him to sue any one of various persons is not a very good reason against its recognition. The plaintiff can have but one satisfaction, and he from whom it is obtained may sue his own vendor upon the implied warranty of title. The reasoning of Mr. Justice Buller is very satisfactory, but it has no application to the present case, as we have in this state no markets overt, in the technical sense of that phrase.

The precise question before us was fully considered in *Hoffman v. Connor*, 20 Wend. 21, and in the same case on a writ of error, 22 Id. 285; and the court held there was no difference in principle between the recovery of the property itself, from the person in whose possession it may be found, and the recovery of its value from one who has bought and sold it. Our statute expressly provides that no sale of stolen property, whether made in good faith or not, shall divest the title of the owner, and in our judgment the inevitable sequence of this is, that at least in cases where the property has passed beyond reach, the owner may recover its value from him by whose act it has been so placed. Such was the present case. The wool was stolen in fleeces, sold to the defendants by the felon, and

packed by them, and if not sent out of the state, at least placed beyond identification. If the property could have been replevied on being identified in their possession, why should not they be required to account for its value after their act had put it beyond the owner's reach, and the proceeds had gone into the defendants' pockets? We can see no good reason. It is suggested that our statute provides for an action against the person "in whose possession" the property may be found, and hence it is urged that one can be maintained only against such person. But the statute is here speaking only of the recovery of the property itself, and in doing this it would necessarily speak of the person "in whose possession" it might be found, since the property could not be recovered from one in whose possession it was not. We do not think an argument can be drawn from this phrase of the statute.

The third instruction for the appellee is objected to on the ground that it assumes the defendant had given no evidence tending to show how or from whom he had bought the wool in his possession. Such was undoubtedly the fact, and although where the evidence is at all conflicting upon a particular point, the court should not, in its instructions, assume such point to be either proven or not proven, yet where no evidence has been offered to establish a proposition, we cannot hold it to be error, and reverse a judgment, merely because an instruction assumes that there is no pretense for denying.

Judgment affirmed.

IF THERE IS NO EVIDENCE TO SUPPORT ISSUE, the court should so instruct the jury: *Alexander v. Harrison*, 90 Am. Dec. 431; *Storey v. Brennan*, 69 Id. 629. But instructions should not exclude from the jury the consideration of points fairly raised by the evidence: *Sawyer v. Hannibal etc. R. R. Co.*, 90 Id. 382, and note 390; *Caldwell v. Center*, 89 Id. 131.

ONE WHO RECEIVES AND SELLS STOLEN PROPERTY is liable in damages: See *Rogers v. Huie*, 54 Am. Dec. 300, and note 305; and market overt is not known to the laws of this country: *Id.*; *Worthy v. Johnson*, 52 Id. 399; *Salvus v. Everett*, 32 Id. 541. But a *bona fide* purchaser of a stolen negotiable instrument takes a good title: *Jones v. Nellis*, 89 Id. 389, and note 391.

NORRIS v. TAYLOE.

[49 ILLINOIS, 17.]

AGENT DEALING WITH PRINCIPAL FOR PROPERTY in regard to which he stands in a fiduciary relation by reason of having had its care, and having collected the rents, paid the taxes, and the like, is bound to make to the principal the fullest disclosure of all the matters connected with it, within his knowledge, which it is important for the principal to know, in order to treat understandingly. If, therefore, the agent, by concealment of such facts and information, obtains the property at a greatly inadequate price, the sale will be set aside. And a sale by the agent, of property so obtained, to one taking with full knowledge of the facts, will likewise be set aside.

BILL in equity by Tayloe to set aside two deeds,—one of them having been made and executed by himself to Norris, who was his agent concerning the land conveyed, and the other being a deed of part of the same lands by Norris to one Foltz. The remaining facts appear in the opinion.

E. A. Small, for the appellants.

D. W. Jackson, for the appellee.

By Court, **BREESE, C. J.** Unless it is established that Varnell in this transaction was the agent of appellant Norris, this decree cannot stand, and to that we have principally directed our attention.

What was the position of these parties? Tayloe, the owner of the land purchased for him by Varnell, was a non-resident, had never seen the land, and knew nothing about it, save through Varnell's statements. Varnell became, thereafter, Tayloe's agent, and in answer to the question, "What was the scope of your agency?" he answered that the list of lands was placed in his hands by Tayloe himself, for the purpose of seeing that the taxes were paid from year to year; that he also had a general supervision, to see that the lands were not trespassed upon, and for this purpose he was empowered by Tayloe to employ other parties in other counties.

On a visit to these lands in the latter part of the spring of 1863, with appellant Norris, he adjusted some difficulties that had arisen between the miners on the land, and made arrangements with Norris to pay the taxes and look after the land. At this time there were several parties digging and prospecting on the land when he was there. Norris himself was then there, digging for lead ore. Varnell left the lands in charge of Norris, authorizing him to take general supervision of them,

and collect the rents as they might accrue. He gave no special power to Norris to grant leases, but told the parties, in the presence of Norris, upon the ground, that he, Norris, would have charge and control of the land.

Varnell spent two or three days while on this visit at the residence of Norris at Galena, and in the mines, during which Norris proposed to purchase the lands for one thousand dollars, and in addition to that, he proposed to purchase jointly with Varnell, which Varnell declined on the ground he had no money, upon which Norris proposed to advance the money, charging Varnell interest upon it until he could repay it. Varnell proposed then to investigate the matter, and after seeing Taylor, at Washington City, the matter was then dropped. He afterwards received a letter from Norris, relating to the same subject.

What followed these preliminaries is found in the letters in the record. The first is the letter from Varnell to Norris, dated Mt. Vernon, February 12, 1866, in which Varnell asks Norris if he will attend to the taxes of 1865 on this land, and asks him how he progresses with the lead mines; asks him what he will give for the land, and then says: "I think I can buy it at a reasonable rate for you, or any one that may want. Please let me hear from you as soon as possible."

Here was a plain proposition to Norris, by Varnell, to become Norris's agent to buy this land. Was this offer accepted by Norris? On the 15th of February, Varnell writes to Norris for an offer for the whole tract, having before inclosed him Foltz's letter proposing to purchase the "forty." He says Norris shall have the refusal, and wants him to be liberal, and offer at once every dollar he feels like giving for the whole tract, and trusts he can make a big strike and get thousands of dollars worth from it, and then asks, merely for his personal gratification, how much mineral has been taken from the land since the first digging commenced.

On the 14th of March Norris answered this letter, and proposed to give two thousand dollars for the land and the accrued rents, which then amounted to more than eight hundred dollars, but which he represented at four or six hundred dollars, though no doubt innocently.

To this, on the 23d of March, Varnell responded by letter from Washington city that the proposition is accepted. He asks Norris to send him the names of the parties, and the exact description of the land, and when he returns to this

state, on the 10th of April, he will bring the deed with him all right, duly executed, ready for delivery, and tells Norris he can go on, as there will be no difficulty.

On the 3d of April, 1866, Varnell again writes Norris from Washington city, acknowledging receipt of a letter of March 27th, from Norris, containing a description of the lands, and says he will send on the deed as directed in a few days,—that Mrs. Tayloe was sick, but would be all right in a day or so. He further says he has put the consideration at fifteen hundred dollars, being the amount at which Norris valued the land, and says he had authority to sell at fifteen hundred dollars, but “the amount I make I desire no one to know.” He says he will be in Virginia until Saturday, when he will start the deed, which will be ready by that time; is glad Norris gets the land, and truly hopes he may do well with it. In a *nota bene* to this letter he says: “I said nothing to Mr. T. [Tayloe], especially of the late strike. Don’t think he would have sold if I did, but I really don’t deem it of any great importance. We have spent a good deal on the land, and ought to make something out of it. Though he authorized me to sell at fifteen hundred dollars, if he knew I obtained two thousand dollars he might not feel kindly about it. I have had considerable trouble and loss of time with and ought to make something out of it, and do not deem the transaction otherwise than as perfectly fair. I would be willing to give the price for the land myself, but I know he would not sell to me.”

There is nothing appearing in the record to show that Varnell was the agent of Tayloe to bargain away this land, except Varnell’s statement in the above letter; nor did he, as this correspondence shows, act as such, but as the agent of Norris to purchase the land for him; he, Varnell, having volunteered to be such agent, as is shown by his letter of February 12, 1866. He was not Tayloe’s agent to sell, but had a supervisory control over the lands, as stated by him in his deposition. The same position was occupied by Norris. He had full charge of the land, and granted privileges in it, and to that extent was the agent of Tayloe. Norris well knew Varnell was not the agent to sell the land, but he made him his agent to purchase.

What, then, was Varnell’s duty under the circumstances? Standing in a *quasi* confidential relation to Tayloe, and at the same time an agent of Norris to purchase valuable property

which Tayloe had intrusted to him, it seems one of the plainest dictates of justice and honesty that Varnell, when negotiating with Tayloe to purchase the property, should have communicated to him all the knowledge he possessed, by the letters of Norris, of the supposed mineral wealth of the land, all of which he studiously withheld, believing, as he says, "it was a matter of no great importance."

At the time the letter of March 14th, by Norris to Varnell, was written, proposing to give two thousand dollars for the land, the survey, which determined most important interests, had not been made; but it was made by the county surveyor about the middle of March, or a few days after the letter of the 14th. That survey developed the fact that a rich lode, not before certainly known to be on that land, was in fact on it, greatly enhancing its value; and even when the letter was written, sufficient developments had been made to justify the belief that the tract contained rich diggings, as in the months of January up to the 23d of March about ninety thousand pounds of mineral, and up to April 1st, about one hundred and forty thousand pounds, were raised on it; so that it is very evident the realities and the prospect together made the land immensely more valuable than the price offered and received; and these facts were known only to one of the contracting parties, — Norris, — and he acting and standing in a fiduciary relation to the owner, of whom, through Varnell, he purchased at a greatly inadequate price, which, on Varnell's own admission, Tayloe would not have accepted had he known the true state of the facts.

We cannot but think it was Norris's duty, before he permitted his offer of March 14th to go before Mr. Tayloe, to have communicated fully the result of the survey which was then in the process of execution, and which he could have done in his letter of March 27th. By accepting the position of an agent to take charge of this land, collect the rents and royalty, and pay the taxes, a fiduciary relation was thus created in regard to whatever related to the land. Confidence was reposed that he would act in all things for the interests of his constituent. Good faith required he should have communicated these important facts, developed by the survey, before he permitted his constituent to sell. But even that which was certainly known — that it was mineral land with flattering prospects — was not communicated by Varnell, his agent, to Tayloe, their common constituent.

As for the other appellant, Foltz, it is very evident he had full knowledge of what was going on. Substantially, he was a party with Norris in purchasing.

We fail to perceive any error in the record, and must affirm the decree.

Decree affirmed.

DUTY OF PERSON STANDING IN FIDUCIARY RELATION to make full disclosure of facts, when dealing with principal: See *Smith v. Townshend*, 92 Am. Dec. 637, and note.

McCARTY v. CARTER.

[49 ILLINOIS, 53.]

CONTRACT MADE WITH MINOR TO FURNISH LABOR AND MATERIALS for the improvement of his property is not binding upon him, and the contractor can claim no lien therefor against the property.

WHERE MINOR CONTRACTS FOR MATERIALS AND LABOR for the improvement of his property, his receipt of the rents from the property so improved, after he becomes of age, will not amount to a ratification of the contract, so as to give to the contractor a lien upon the property.

MECHANICS AND MATERIAL-MEN ARE BOUND TO ASCERTAIN whether the party with whom the contract is made is a minor or person otherwise incapacitated, for if the contract is with such a person it is not binding, and the lien of the contractor will fail.

PERSON HOLDING LESS ESTATE IN REALTY THAN FEE is nevertheless considered an owner under the Illinois mechanic's lien-law, but only to the extent of his interest or estate, and he cannot, by his contract, create a lien against the property to any greater extent than his estate or interest.

ESTATE OF HUSBAND ACQUIRED BY MARRIAGE may, by his contract, be subjected to the lien of a mechanic or material-man under the Illinois statute.

CONTRACT FOR ERECTION OF BUILDING UPON PREMISES by one who is not owner thereof, and who is unauthorized to so contract, is not ratified so as to allow a claim of lien against the premises, by mechanics and material-men, by the fact that the owner, after the completion of the house, received the rents and profits therefrom.

PETITION to establish mechanic's lien. The opinion states the facts.

Bonney and Griggs, and J. E. Fay, for the appellants.

Thompson and Bishop, for the appellee.

By Court, LAWRENCE, J. This was a petition to establish a mechanic's lien, brought by Carter, the appellee, against Samuel McCarty, Emily A. McCarty, his wife, and Lucy J. Davis, a daughter by a former husband of said Emily A. Mc-

Carty. The lot upon which the building had been erected belonged to the daughter, subject to a right of dower in her mother. The appellee had made his contract in writing with Samuel McCarty. On the hearing, the court gave for the complainant the following instruction:—

“If the jury shall believe from the evidence that the contract in question was made by McCarty on behalf of himself and Mrs. McCarty and Lucy J. Davis, and that he was authorized by them to make the same (and that after the said Lucy J. became of age she received the rents and profits of the building erected under the contract, or any part thereof), then such contract is binding, although their names do not appear in it, and it does not on its face purport to be their act.”

The principle embodied in this instruction was repeated in several others, and we will first consider it in regard to the infant appellant. The lien in this class of cases arises from work done or materials furnished under an obligatory contract, and if the contract ceases to be binding, the lien necessarily fails. An infant is not bound by his contract, except in certain cases, to which the erection of a building for rent does not belong. A conveyance or mortgage by him of his real estate would not be binding upon him, and the legislature certainly never intended to allow him to encumber his property indirectly by a contract for its improvement, when he cannot do the same thing in a binding mode by an instrument executed expressly for the purpose. A minor who has nearly attained his majority may be as able in fact to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held *sui juris*. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years, and neither in one case nor in the other can it permit a contractor to claim a lien against his property under the guise of a contract for improvement. This would expose minors to ruin at the hands of designing men. The mechanic who erects a building must take, like all other persons, the responsibility of ascertaining that he is contracting with a person who has reached the requisite age. We therefore hold it immaterial whether Lucy J. Davis, being then a minor, authorized McCarty to make this contract or not.

Neither do we consider her receipt of rents, after she became of age, such a ratification of the contract of McCarty, even though made, as the instruction says, in her behalf, as would operate to create a lien against her. Ratification by an adult of a contract made by him when a minor is a question of intention. It can be inferred only from his free and voluntary acts or words. But it would be unreasonable to compel a minor to choose between the utter abandonment of his property and the creation of a lien upon it under a contract made during his minority, and to say, if he retains the property, he ratifies the lien. If we were to hold that the mere receipt of rents amounted to a ratification, we should be taking from the minor the protection which the law designs to give him, for the builder might safely assume the minor would continue in the possession of his own property, and thus by ratification create a lien which the statute had not given when the contract was made. The builder might thus make what contract he could with the minor, under the assurance that though the contract was not binding and the statute gave him no lien, one would nevertheless be worked out for him by a necessary ratification.

The court also, at the instance of the complainant, gave the following instruction:—

“Any person is the owner of land, within the meaning of the statute relating to mechanics’ liens, who has an interest for years in the property, by lease or otherwise, so as to entitle him to the rents and profits thereof.”

It is insisted by appellee’s counsel that this instruction is in accordance with the statute which provides, “If the person who procures work to be done or materials furnished has an estate for life only, or any other estate less than a fee-simple, in the land or lot on which the work is done or materials furnished, the person who procures the work or materials shall nevertheless be considered as the owner, within the meaning of this chapter.”

The candor of counsel for appellee would have been less questionable if, in making this quotation from the statute, they had not stopped in the middle of the sentence. The provision of the statute is not that a person having a less estate than a fee-simple shall be considered as the owner, but that he “shall be considered as the owner, within the meaning of this chapter, to the extent of his right and interest in the premises, and the lien herein provided for shall bind his whole estate therein

in like manner as a mortgage would have done." As the legislature had in the first section given the lien upon a contract with the owner, this provision was inserted in order to bring persons making contracts, and not technically the owners, within the operation of the statute to the extent of their interest or estate. The legislature was not guilty of the absurdity of undertaking to enact that a tenant for life or years could, by contract, create a lien upon the fee. This instruction should not have been given.

As to the appellant Mrs. McCarty, it is impossible to determine from this record what her interest in this property is, as it does not appear whether her marriage with her present husband was contracted before or since the passage of the law of 1861 in regard to married women. We infer, however, that it was contracted before that date, and if her dower in this property was also assigned before the act was passed, it is clear the law could not divest her husband of the estate during coverture that he acquired by the marriage: *Rose v. Sanderson*, 38 Ill. 248. This estate in him would of course be subject to the lien. Whether the estate that would remain in the wife, should she survive him, would fall within the description of "sole and separate property," under the act of 1861, and whether a verbal contract made by her with a mechanic for its improvement would create a lien, are questions which counsel have not presented in their brief, and which we prefer not to decide without argument, upon a merely hypothetical state of facts. But whatever may have been the date of the marriage, the fourth instruction given for complainant was erroneous, both as to the wife and daughter. It was as follows:—

"If the jury shall believe from the evidence that the contract in question was made by McCarty for himself, and also on behalf of his wife and daughter, and was ratified by both the wife and daughter by the receipt of the rents and profits of the building, or in any other way, after said Lucy J. Davis became of age, and that any one of the said parties was the owner of the lot on which the building was placed, then such ownership of any of the three above named is sufficient ownership to entitle the complainant to enforce a lien for any balance that may be due him under the contract, if there is, in fact, any balance due complainant under the same."

This instruction substantially tells the jury that the mere receipt of rents and profits from the building by Mrs. McCarty and Lucy J. Davis would have the effect of creating a lien,

even though they had neither made the contract themselves nor authorized it to be made for them, and independent of all knowledge on their part as to the nature of the contract upon which the building was being erected. Even admitting them to have both been competent to contract, certainly the mere fact that McCarty made a contract for them, without their authority or knowledge, would neither bind them nor compel them to submit to a lien merely as a consequence of receiving rent. If they had been competent to contract, and knew that the building was being erected under a contract made in their behalf, by a person claiming authority to bind them, and had permitted the contractor to proceed under that belief, a very different question would be presented. We find no facts in this record from which it must be presumed, as a necessary inference, that McCarty would not have erected a building except upon a contract made in their name, and that they must have known the contractor was acting under such a belief. Perhaps such an inference might be drawn by a jury, but there is nothing to justify the court so far to assume it as to instruct that the receipt of rents and profits would create a lien. If the husband had an estate during coverture, it is certainly not impossible that he would have made the contract in his own name and on his own credit.

For the errors indicated in the foregoing opinion, the decree must be reversed.

As there is to be another hearing, it is unnecessary for us to discuss the question of damages.

Decree reversed.

ESTATES AND INTERESTS AFFECTED BY MECHANICS' LIENS: See the notes to *Lyon v. McGuffey*, 45 Am. Dec. 678, and *Loonie v. Hogan*, 61 Id. 688-700, where the question of the right of mechanics to liens upon the property of minors, or persons otherwise incapacitated, or upon the interest of one having a less estate than a fee, is discussed. In *Judson v. Stephens*, 75 Ill. 257, the principal case is cited to the point that a tenant for years cannot, by contract, create a lien upon the fee, but he may create a lien upon his interest, and to the extent thereof.

TITSWORTH v. STOUT.

[49 ILLINOIS, 78.]

TENANT IN COMMON REMOVING ENCUMBRANCE FROM ESTATE is entitled to contribution from his co-tenants to the extent of their respective interests, and a court of equity, to secure such contribution, will enforce upon the interests of the latter an equitable lien of the same character as that which has been removed.

TENANT IN COMMON BUYING OUTSTANDING TITLE TO COMMON PROPERTY will not be permitted to set it up against his co-tenant until he has given him an opportunity to contribute, and thereby to participate in the benefits of the purchaser.

IN SUIT FOR PARTITION AGAINST CO-TENANT WHO HAS REMOVED ENCUMBRANCE from the common property, and has set up and proved such fact without filing a cross-bill for affirmative relief, a decree for sale of the premises, in the event of non-payment of his claim, cannot properly be rendered, but the decree should, under the Illinois statute of 1861, be that the petitioner take his allotment subject to the defendant's lien for one half of the money paid for the removal of the encumbrance.

SUIT for partition. The opinion states the facts.

Parks and Annis, for the appellants.

Wheaton and McDale, for the appellee.

By Court, LAWRENCE, J. The appellee, Mary F. Stout, and an infant named Emily Parkhurst, one of the appellants, were the owners, as tenants in common, of a tract of land which was subject to a mortgage. This was foreclosed, and the premises were bought at the master's sale by one Phillips, who assigned the certificate of purchase to Mrs. Stout. The mother of Emily Parkhurst, having a right of dower in an undivided half of the premises, and being also guardian of Emily, redeemed the premises, within twelve months after the sale, by paying to the master the requisite amount under the statute. The master tendered the money to Phillips, who refused to receive it, saying the matter was out of his hands, and a few days afterwards Mrs. Stout demanded and received it, giving her receipt to the master. This took place in August, 1866, and the lien under the mortgage having been thus canceled, Mrs. Stout, in May, 1867, filed this bill for partition, making Emily Parkhurst and her mother parties. They answered, setting up the foregoing facts, which were also proved upon the hearing, but they filed no cross-bill. The court decreed a partition, setting off to Mrs. Stout, upon the report of the commissioners, one half the premises, by metes and bounds, to hold in severalty. The defendants have prosecuted an appeal.

We have stated above all the facts that are really material, and from them it is plain that the mother of Emily Parkhurst, who redeemed from the master's sale, either in her own right, as dowress, or as guardian of Emily, has a valid claim against Mrs. Stout, which amounts to an equitable lien on the land while in her hands. This results from the familiar principle that where one tenant in common has removed an encumbrance from the common estate, the other tenants must contribute to the extent of their respective interests, and, to secure such contribution, an equitable lien upon their interests, of the same character with that which has been removed, will be enforced by a court of chancery. The redeeming tenant in common, in order to secure contribution, is substituted to the same lien which he has redeemed. On the other hand, where one tenant in common buys in an outstanding title, he cannot set it up as against his co-tenant without giving him an opportunity to contribute, and thereby participate in the benefit of the purchase.

In the case at bar, Emily Parkhurst, or her guardian for her, had a right to redeem from the master's sale, and she could only redeem by paying the full amount of the purchase. It was not in her power to redeem her undivided half. If Phillips had retained the certificate of purchase, there would have been no question but that the redemption was equally for the benefit of the co-tenant, Mrs. Stout, and the latter would have been obliged to contribute. The fact that she had bought the certificate in no way affects this question. If she had canceled it after buying it, she then would have had a claim against Emily Parkhurst's undivided half of the land for contribution. But instead of canceling it, she treated it as in force against her co-tenant, and, by virtue of its assignment to herself, demanded and received all the redemption money. She should only have received one half, and should have directed the master to return the other half to her co-tenant. The equities of all parties would then have been adjusted, and this proceeding and the decree herein would have been proper.

If the defendants had filed a cross-bill, they would have been entitled to a decree enforcing their equitable lien against the complainant's estate in the premises, by directing its sale in case of non-payment. This they did not do, and as they asked no affirmative relief by cross-bill. the court committed no error in not decreeing a sale.

The court, however, did err in not providing in its decree that the complainant should take her allotment subject to the equitable lien of the guardian of Emily Parkhurst for the payment of one half the redemption money. This would have been proper under the partition act of 1861, even without a cross-bill, as that act expressly authorizes the apportionment of encumbrances.

For this error the decree is reversed, and the cause remanded.

Decree reversed.

ONE CO-TENANT BUYING OUTSTANDING TITLE HOLDS IT IN TRUST for all, and is entitled to contribution from all of their share of the consideration actually paid: See *Roberts v. Thorn*, 78 Am. Dec. 552, and note. The principal case is cited in *Fischer v. Estaman*, 68 Ill. 83, to the point that courts of equity to secure such contribution will enforce upon the interests of those who fail to pay, a lien of the same character as that which has been removed. But it is said no such rights can be enforced in ejectment: *Fischer v. Estaman*, *supra*.

TO ENTITLE DEFENDANT TO AFFIRMATIVE RELIEF in equity, he should file a cross-bill: *Erlinger v. Boul*, 7 Bradw. 43; *Purdy v. Henslee*, 97 Ill. 394, both citing the principal case.

THE PRINCIPAL CASE IS CITED to the point that where one purchases a whole tract at a master's sale, and assigns an undivided interest in his purchase, there cannot afterwards be a redemption of such undivided interest, for each interest is encumbered with the whole debt: *Durley v. Davis*, 69 Ill. 134; *Groves v. McGahee*, 72 Id. 526.

HARDIN v. KIRK.

[49 ILLINOIS, 153.]

WHERE SEVERAL SEPARATE ACTIONS OF EJECTMENT ARE BROUGHT against the same defendant, at the same term of court, for the same land and by different attorneys, both being docketed as one suit, the plea being so entitled and filed, and the docket entries showing that it was so treated by the parties, the court will be justified in the inference that they were consolidated by consent; and the defendant's motion, made after hearing the evidence, that the court require the plaintiffs to elect upon which declaration they will proceed, comes too late, and the court will not err in denying the motion. If, however, the court grants the motion, and it appears that the evidence does not establish a right to recover on the part of the plaintiff whose declaration was excluded, the court commits no error, its action operating as though the court had rendered judgment against him, which it could properly have done under the circumstances.

UNDER ILLINOIS STATUTE CONCERNING ACTIONS OF EJECTMENT, which provides that "the declaration may contain several counts, and several parties may be named as plaintiffs jointly in one count, and separately in

others," parties may sue jointly, and proceed jointly in one count, for the land, and each separately in other counts, and either for the whole, a part, or for a separate and undivided interest, but parties cannot bring separate actions, and be required to consolidate them without their consent.

TO RENDER DEED ADMISSIBLE IN EVIDENCE, acknowledgment must show where it was made and certified, or the court must be able, by taking the acknowledgment and deed together, to presume in what state it was taken. Thus where the venue to a certificate of acknowledgment is simply "County of New York," and there is nothing in the certificate nor in the deed indicating in what state the acknowledgment was taken, the acknowledgment is insufficient, and the deed not admissible in evidence.

UNDER DECLARATION IN EJECTMENT FOR ENTIRE PREMISES, an undivided interest cannot be recovered.

IN ACTION OF EJECTMENT FOR WHOLE PREMISES, plaintiff will not be permitted to establish title to a less interest; and hence a deed offered for that purpose is properly excluded.

EJECTMENT. The opinion states the case.

E. S. Holbrook, for the appellants.

Scammon, McCagg, and Fuller, for the appellee.

By Court, WALKER, J. This was an action of ejectment, brought in the Will circuit court to the January term, 1866. In form, there are two declarations, each for the entire tract of land, one by Hardin, and is signed by Holbrook, his attorney; the other by Wakeman, and signed by E. A. Coventry, his attorney. They are each separately entitled of the term, and in other respects formal declarations with the commencement, body, and conclusion of a declaration in ejectment containing one count, and signed by separate attorneys. Neither refers to the other, nor is there any reference in either to the plaintiffs in the other. They are in all respects declarations in ejectment by different plaintiffs for the same land in different suits. The commencement of each is by but one plaintiff. One notice and copy seem to have been served, but whether as one or separately, does not appear from the record.

The docket was entitled as of both plaintiffs against the defendant, and as one case, and the rule to plead was so entered. The plea was entitled in the same manner. After hearing the evidence, the court who tried the case, by consent without a jury, on the motion of defendant, required plaintiffs to elect upon which declaration they would proceed, when they elected to proceed for a recovery in favor of Hardin. Exception to the decision of the court requiring an election was taken and

preserved, and is now relied upon for a reversal. The court below also excluded a deed in the chain of title for the land, and found for the defendant, and rendered judgment in his favor, which is complained of as error.

The ninth section of the ejectment law declares that "in any case, other than where the action shall be brought for the recovery of dower, the declaration may contain several counts, and several parties may be named as plaintiffs jointly in one count, and separately in others." Under this section, Hardin and Wakeman, had they desired, could have sued jointly, and proceeded jointly in any count for the land, and each of them separately in other counts, and either for the whole, a part, or for separate and undivided interests. But it does not provide that separate suits may be brought, and afterwards united, without the consent of the parties. The court, in the exercise of its discretion, might, no doubt, have permitted such a consolidation; and we might infer from the fact that the parties treated it as but one suit by the docket entry, the service, the rule to plead, and by the pleas, that it was so regarded by the court and the parties.

The question then presents itself, whether the action of the court in requiring the plaintiffs to elect for which plaintiff they would proceed was error. Had Wakeman shown a right of recovery, it would have been error, as the defendant's objection came too late. He should have pleaded separately, and had the cases separately docketed, and not have waited until the plaintiffs had adduced all of their evidence. By going to trial, and treating it as one case, defendant waived the right to object. But it appears that Egan entered the land in May, 1836; still Egan's deed to Wakeman, although executed in July, 1836, was never recorded in Will County. It was recorded in Cook County soon after its execution, and a certified copy from the records of Cook County was spread upon the records of Will County on the 22d of August, 1861.

It appears the land in controversy was sold on an execution against Egan, and in favor of Hastings, from the municipal court of Chicago, and a sale to James Grant. It also appears that the land was redeemed from this sale on an execution in favor of Nathaniel P. Bailey and Henry W. Reynolds, and against Egan, on the 25th of December, 1838, and that they became the purchasers of the land under their execution, from which it was not redeemed, and for which they received a sheriff's deed, which was recorded in Will County on the

16th of January, 1841. Thus it is seen that this sale, having been made, and the sheriff's deed having been recorded before the deed from Egan to Wakeman, the sheriff's deed acquired priority, and extinguished Wakeman's title. Wakeman then having failed to establish a right to recover, the dismissal or abandonment of the count in his favor could not have prejudiced his rights. It only operates as though the court had rendered judgment against him at that state of the proceeding, which could have been done.

We now come to consider the principal question presented by the record. Was there error in excluding the deed of Bailey and Reynolds to Brown and Wyncoop? The certificate of acknowledgment by Bailey and wife fails to show in what state the acknowledgment was made. The venue to the certificate is, "County of New York." This venue may apply equally well to a county of the same name in any state of the Union. The deed recites that he had formerly been in business in the city of New York, but it fails to state that he was then in the state and county of New York. There is nothing in the body of the deed from which it can be inferred that the acknowledgment was taken in the state of New York. It must appear from the acknowledgment where it was made and certified, or by taking the acknowledgment and deed together, we must be able to presume in what state it was taken. The officer taking it can only act within the territorial limits of his jurisdiction, and it must appear that the act was performed within those limits. In this case, the certificate and deed failed to show where the officer acted at the time when he took this acknowledgment, and is defective, and the deed as to his interest in the land was therefore inadmissible.

The acknowledgment of the deed by Reynolds appears on its face to have been acknowledged in the state, county, and city of New York; and from the statutes of New York read in evidence, the acknowledgment appears to be sufficient to authorize the deed to be read in evidence, to show that he thereby conveyed his title to the land. It was not, however, admissible, for the reason that the declaration claimed the whole of the land, and he only conveyed an undivided interest in the land. The seventh section of the ejectment act declares that "if such plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in such declaration." The share conveyed by Reynolds, and which appellant claims to hold, is not particularly stated in the dec-

laration. It contains no such count, and without it, this court has repeatedly held that an undivided interest cannot be recovered. This being the case, the deed was properly excluded. The twenty-fourth section of the ejectment law does not apply, under the pleadings in this case. The sixth clause of that section only applies where the declaration proceeds for a particular undivided interest, and not where it claims the entire interest. This is manifest by a reference to the seventh section. The clause in the latter section is not repugnant to the first-named section, and hence that part of the seventh is not repealed. They are consistent and may stand together. We perceive no error in this record, and the judgment must be affirmed.

Judgment affirmed.

CONSOLIDATION OF ACTIONS: See note to *Logan v. Mechanics' Bank*, 58 Am. Dec. 508-512.

DEFECTS IN ACKNOWLEDGMENT, WHEN FATAL AND WHEN NOT: See the extended note to *Livingston v. Kettelle*, 41 Am. Dec. 168-184, and see particularly page 172, where the question as to whether locality must appear from the certificate is discussed; and see *Tully v. Davis*, 83 Id. 179, and note; *Graham v. Anderson*, 92 Id. 89. In *Hardin v. Osborne*, 69 Ill. 96, the deed passed on in the principal case, again came before the court, who, in admitting it in evidence, say that although the venue of the certificate of acknowledgment was only "County of New York" with no mention of the state, and alone insufficient, there was an appended certificate of magistracy of the officer who took the acknowledgment, which was full and sufficient, and certified that the officer was at the time of taking the acknowledgment a commissioner of deeds for the city and county of New York, state of New York, and the suggestion is made that in *Hardin v. Kirk* this certificate must have been overlooked.

ROGERS v. GALLAGHER.

[49 ILLINOIS, 182.]

BILL OF EXCHANGE DOES NOT LOSE ITS NEGOTIABILITY by being discounted by the acceptor before maturity; and if he reissues it before it falls due to one who takes it in good faith for a valuable consideration, the indorsers will be liable to the holder in the same manner as if the bill had not passed through the acceptor's hands.

PRE-EXISTING INDEBTEDNESS IS GOOD CONSIDERATION for reissue to his creditor, before it falls due, of a bill of exchange which the acceptor has discounted before maturity.

ASSUMPSIT. The opinion states the facts.

Rogers and Garnett, for the appellant.

Scammon, McCagg, and Fuller, for the appellee.

By Court, WALKER, J. This was an action of *assumpsit* against appellant, impleaded with Bradford, upon a bill of exchange, dated at Pine Bluffs, Arkansas, April 3, 1861, drawn by F. Brower, and directed to Stewart and James, New Orleans, Louisiana, whereby they were requested to pay to the order of Rogers and Bradford \$783.60. It was indorsed by the payee, and sent by him to the drawees, to be received and applied upon indebtedness of Rogers and Bradford to the drawer. The bill was received and applied as a credit upon the indebtedness, the credit bearing date on the 11th of April, 1861, and was for the sum of \$697.10, being the amount of the bill, less a discount of twelve per cent for the time it had to run before it matured. Appellant being in New Orleans on the 10th of May, 1861, settled with Stewart and James, and gave his notes for the balance due them after deducting the credit for the bill and other payments, which notes, after deducting payments, were taken up, and new ones given on the 12th of April, 1862, all of which were paid by the 1st of May, 1866.

It appears that Stewart and James, upon whom the bill was drawn, and to whom it was sent to be applied on the indebtedness to them by Rogers and Bradford before it fell due and after it was thus sent to them, reissued it, and delivered it as collateral security to appellee, to whom Stewart and James were indebted. When it matured, it was presented and protested for non-payment, and this suit was brought against appellant and Bradford on their indorsement to recover the amount of the bill, appellant only being served with process. A trial was had, and judgment was rendered against him. To reverse that judgment the cause is brought to this court by appeal, and various errors assigned on the record, but they resolve themselves into one, and that questions the correctness of the judgment on the facts before the court below on the trial.

It is urged that when the bill was presented to the drawees and taken up by them, it was paid, and lost all vitality, the payees being discharged as indorsers; and that the acceptors, by reissuing it, might render themselves liable for its redemption, but could not revive the liability of the payees on their indorsement. On the other hand, it is insisted that, as appellees took the bill before its maturity, although received from

the payees, they are *bona fide* holders, and have a right to recover precisely as though it had never been taken up by the acceptors, and had come from the payees or from another indorser; that when Stewart and James took the paper up, they did so as purchasers, and not with the intention of paying it, but simply discounted it, and held it as would any other purchaser, and hence might negotiate it at any time before maturity, so as to hold the other parties to the bill as well as themselves.

In Story on Bills, section 410, it is laid down as a rule that it is the duty of the acceptor to pay the bill, and by his due payment thereof he discharges all other parties thereto from liability on the bill, either as drawers, indorsers, or guarantors, if the payment is rightfully made by him to the holder, without any knowledge of any infirmity in the title of the latter, and if the names of the parties on the bill through whom the holder derives his title are genuine, and not founded on forgeries. It is said in Chitty on Bills, 11th Am. ed., 223: "But when a bill has been once paid by the acceptor, it is *functus officio* at common law; . . . and a bill or note cannot be negotiated after it has been once paid, if such negotiation would make any of the parties liable who would otherwise be discharged; nor can it be negotiated so as to charge even the indorsers."

In this case, the bill was taken up by the parties who were to pay it by its terms, and there can be no pretense that the drawees, who were acceptors, could have sued the indorsers for non-payment. Had the acceptors protested it for non-payment, and sued the indorsers, no one could have for a moment supposed that they could have recovered. There could be no pretense for such a right. But where the bill was again put in circulation by the acceptor, did innocent holders acquire such a right? Did the taking up the bill, as it was done by the acceptors before maturity, and at a discount, destroy its negotiability before maturity? Was it payment?

It is said in Story on Bills, section 223, that "where a bill has once been paid by the acceptor after it becomes due (although not if paid before due, and the fact be unknown to the holder), it loses all its vitality, and can no longer be negotiated. So if it be dishonored by the acceptor, and is taken up by the drawer, he cannot negotiate it so as to charge the indorsers, although he might so as to charge himself or the acceptor, if the latter be liable to him." Again, at section 417, he says:

"In order to make a payment by acceptor good and binding upon all other parties to the bill, it should be made at maturity of the bill, and not before; for although as between the real *bona fide* holder and the acceptor, the payment, whenever made, and however made, will be a conclusive discharge from the obligation of the bill; yet, as to third persons, it may be far otherwise; for payment means payment in due course, and not by anticipation. If, therefore, the acceptor should pay a bill of exchange before it is due to any holder, who should afterwards, and before its maturity, indorse or pass the same to any subsequent *bona fide* indorsee or other holder, the latter would still be entitled to full payment thereof from the acceptor at its maturity; for payment of the bill before it is due is no extinguishment of the debt as to such persons."

In Bayley on Bills, Am. from the 4th Lond. ed.. 91, it is said: "If a bill or note be paid before it is due, and nothing be done upon it to mark such payment, an indorsement afterwards, before the time it would have become due, will give the indorsee, if he take it *bona fide*, and for a valuable consideration, the same right as if there had been no such payment."

The same rule is announced in the cases of *Morley v. Culverwell*, 7 Mees. & W. 174; *Altenborough v. Mackenzie*, 36 Eng. L. & Eq. 562; *Swope v. Ross*, 40 Pa. St. 193 [80 Am. Dec. 567]; *Eckert v. Cameron*, 43 Id. 120. From these cases, it would seem that the weight of authority is, that if the note is only discounted before maturity, the bill does not lose its negotiability, but may be again put in circulation, and parties whose names appear on it bound as though it had not passed through the acceptor's hands. There are other cases which seem to oppose this rule, but the weight of authority is against them. If, however, it were actually paid, and so understood and intended by the parties, the rule might be otherwise. In this case, the bill seems to have been only discounted, and not paid. Nor does it appear that appellee had any notice of the transaction, and, for aught that appears, he took the bill in good faith. The indebtedness of Stewart and James to appellee was, as has been repeatedly held by this court, a sufficient consideration to support the transfer, and to render the bill negotiable; and hence the defense of appellant is cut off by the transfer of the bill.

The judgment of the court below must be affirmed.

Judgment affirmed.

PAYMENT OF PROMISSORY NOTE OR BILL OF EXCHANGE, EFFECT OF IN CASE OF REISSUE. — *Payment by Maker before Maturity.* — The general rule governing negotiable paper is, that when it is once paid or satisfied in the due course of business, and the liability of all the parties thereto is once discharged, the paper is dead, of no further validity, and that the contract evidenced thereby is utterly extinguished. But there are numerous circumstances under which the amount of such paper may be paid on account thereof by one person to another, and which does not produce that result; as, for example, where the maker pays the amount of a promissory note to the holder before its maturity without requiring a return of the note to his possession, and where such holder afterwards and before the maturity of the note indorses it over to an innocent stranger in the due course of business. In such a case the maker must again pay the amount of the note to such indorsee. The same rule applies to the payment by the acceptor of a bill of exchange to the indorsee thereof or the drawer; they must at the time of payment have been the lawful owners and holders of the bill, and not have indorsed it over. Upon this question, Story says: "If, therefore, the maker should pay a promissory note before it is due to any holder who should afterwards and before its maturity indorse or pass the same to any subsequent *bona fide* indorsee or other holder, the latter would still be entitled to full payment thereof from the maker at its maturity; for payment of the note before it becomes due is no extinguishment of the debt as to such persons": Story on Promissory Notes, sec. 384. In the recent case of *Best v. Crall*, 23 Kan. 482, S. C., 33 Am. Rep. 185, it is said: "Now, a maker of a negotiable note who before its maturity pays the payee the amount thereof without a surrender of the note, does so at his peril. If the payee is no longer the holder or entitled to receive the money, the payment in no manner discharges the paper or prevents the real holder from recovering upon it." We find this language in an Indiana case: "Payment in order to extinguish the bill should be made to the real proprietor. Even payment to the payee will be inoperative if he have ceased to be the proprietor of it by having indorsed it to another person, and the drawee have notice of the fact: *Chitty on Bills*, 393. Payment by the acceptor to the drawer could no more affect the rights of the payee or his indorsee than the bestowal of so much money to a person not a party to the bill": *Woodward v. Elliott*, 13 Ind. 516. To the same effect are *Mobley v. Ryan*, 14 Ill. 52; S. C., 56 Am. Dec. 488; *Jefferson Co. v. Fox*, 1 Morris, 48; *Graves v. American Exchange Bank*, 17 N. Y. 205; *Grant v. Kidwell*, 30 Mo. 455; *Griswold v. Davis*, 31 Vt. 390; *City Bank v. Taylor*, 60 Iowa, 66; *Mayo v. Moore*, 28 Ill. 428; *Daniel on Negotiable Instruments*, sec. 1233. The court of Virginia go further still, and hold that where the note is indorsed after its maturity, and payment is afterwards made to the indorser, that this constitutes no defense to an action by the indorsee against the maker: *Davis v. Miller*, 14 Gratt. 1. In California, the opposite is held under statute: *Bank of Stockton v. Jones*, 65 Cal. 437. But where a note was paid before maturity, and afterwards before it was due the holder indorsed it over to a third person, but told him of the payment, he was held to have taken the note subject to such payment: *White v. Kibling*, 11 Johns. 128.

Payment at or after Maturity. — In speaking of the payment of a note or bill at or after its maturity, a recent author says that by such payment "the instrument is not only extinguished, but should the holder fail to deliver it up, and transfer it to another party, such party would receive it with notice upon its face that it was overdue, and he could acquire no better right or

title than his transferrer; and the plea that it was paid before the transfer would be available against him": Daniel on Negotiable Instruments, sec. 1233 a. Again, at section 1238, this author says: "As a bill or note when paid at maturity by the acceptor or maker is thereby utterly extinguished, it is clear that if he were to reissue it, and it were to pass into the hands of even a *bona fide* holder, he could not hold the drawer or indorser liable, for its being overdue would in itself be sufficient notice of payment." The reasons in support of this proposition are unanswerable, and are supported by *Gordon v. Wansey*, 21 Cal. 77; *Gardner v. Maynard*, 7 Allen, 456; S. C., 83 Am. Dec. 699; *American Bank v. Jenness*, 2 Met. 288.

What Parties may Reissue Bill after Payment—General Rule.—The general rule governing the right of any of the parties to a bill or note, who have paid the same and taken it into their possession, to reissue the same as a negotiable instrument, is, that a bill or note cannot be indorsed or negotiated after it has once been paid, if such negotiation or indorsement would make any of the parties liable apparently who have already been discharged. "The law is well settled that after payment at maturity a note cannot be reissued, so as to charge any party thereto who otherwise would be discharged, unless with his knowledge or consent": *Citizens' Bank v. Lay*, 80 Va. 440. In speaking of the instances in which a paid note may be reissued, the court say in the very able opinion in *Beebe v. Real Estate Bank*, 4 Ark. 551: "Such is the case where the transfer will not subject any party thereto whose liability thereon was discharged by the payment, to an action at the suit of the indorsee or holder. But where the effect of the transfer would be to subject any party to the instrument, whose liability was extinguished by the payment, to a suit by or in the name of the assignee, indorsee, or holder, they have uniformly been considered and held to be not negotiable"; to the same effect is *Rolfe v. Wooster*, 58 N. H. 526; *Mead v. Small*, 11 Am. Dec. 62; *Hopkins v. Farwell*, 32 N. H. 425.

Application of This Rule.—In *Beebe v. Real Estate Bank*, 4 Ark. 546, the question was presented, "What is the legal consequence of the holder of a bill of exchange indorsing it to the acceptor, where there are several parties to the bill?" In a very able opinion the court argue that the acceptor was the principal debtor; that after its indorsement to him no action could be maintained upon it against any party to it; and that consequently they were all discharged. "And if these positions be true, as we consider them to be, the instrument, when the acceptor became the proprietor and legal holder thereof, was divested of all legal obligation, and the parties to it were, of course, discharged from all responsibility thereon. And we consider it equally clear that the simple indorsement of the bill by the acceptor could not revive its obligation, or in any manner bind the other parties to the transaction, notwithstanding he might thereby charge himself, as we have no doubt he did, though not as the acceptor of the bill, because, as before shown, its legal obligation was previously extinguished, and it had ceased to be a negotiable security." For the same reason, to wit, that it would revive the liability of a previously discharged indorser, the drawer of a protested draft, which has been taken up by the indorser and returned to him with the indorsement uncanceled, has no right to put it in circulation again: *Gardner v. Maynard*, 7 Allen, 456; S. C., 83 Am. Dec. 699. A party who indorses a bill or note after it has been paid, knowingly, binds himself, and his indorsee may recover from him: *Mabry v. Matheny*, 10 Smedes & M. 323; S. C., 48 Am. Dec. 753; *Price v. Sharp*, 2 Ired. 417.

When Maker Who has Paid may Reissue.—Mr. Daniel, in his invaluable work

on negotiable instruments, lays down the law that, subject to two exceptions, a drawer who has paid a note or bill may reissue the same: Sec. 1241, citing *French v. Jarvis*, 29 Conn. 348; *Callow v. Lawrence*, 3 Maule & S. 95; *Williams v. James*, 15 Ad. & E., N. S., 499. The first exception is, that where the acceptance was for the drawer's accommodation, as after he had paid it, he would have no cause of action against the acceptor; he cannot reissue the bill so as to give his indorsee a right of action against him: Sec. 1239. This position is undoubtedly supported by authority, as it is well settled that payment of an accommodation note by the maker relieves the acceptor from all further responsibility: *Beck v. Robley*, 1 H. Black. 89, note; *Jones v. Broadhurst*, 9 Com. B. 173; *Gardner v. Maynard*, 7 Allen, 457; S. C., 83 Am. Dec. 699; *Lazarus v. Cowie*, 3 Q. B., 43 Eng. Com. L. 459; *Walwyn v. St. Quintin*, 1 Bos. & P. 652; *Bacon v. Searles*, 1 H. Black. 88; *Beebe v. Real Estate Bank*, 4 Ark. 546.

The second exception made by Mr. Daniel to the right of the maker of a note or bill to reissue the same after he has paid it is, that the drawer cannot reissue a bill if the name of any indorser to whom he himself was liable remained upon it: Negotiable Instruments, sec. 1240. "For in that event the holder could not trace title against the acceptor, the indorsements having been discharged. Besides, the indorser whose name remains upon the bill would be exposed to liability to a holder, and therefore such a bill is held to be not negotiable": Id., citing *Gardner v. Maynard*, 7 Allen, 457; S. C., 83 Am. Dec. 699; *Beck v. Robley*, 1 H. Black. 89; *Jones v. Broadhurst*, 9 Com. B. 173. A very interesting application of this rule occurred in *Price v. Sharp*, 2 Ired. 417, where the court held that when an accepted bill of exchange, payable to a third person, is protested and taken up by the drawer, that he cannot again put it in circulation. The payment of an accepted bill by the maker does not extinguish the same as to the acceptor, but the indorsee of the maker or of the holder may recover the amount from him: Daniel on Negotiable Instruments, sec. 1237; *Jones v. Broadhurst*, 9 Com. B. 173; *Thornton v. Maynard*, L. R. 10 Com. P. 695. The question of the right of a maker to reissue a note after its payment by him arose in *Gordon v. Wansley*, 21 Cal. 77. It was there held that an assignment of a promissory note to one of the joint makers thereof before its maturity amounts to payment, and that the right of action against the makers is not revived by a subsequent assignment to a third person after maturity. The court say, however, that if the assignment had been made to an innocent party before maturity, he would have a right of action against the makers. *Eastman v. Plumer*, 32 N. H. 238, is much to the same effect as the first proposition. Another case in which the maker of a promissory note, who had paid the same, was held disabled from negotiating the same is *Dooley v. Fire and Marine Ins. Co.*, 3 Hughes, 221. This is a very clear and able case, and explains the reason for the rule making payment an extinguishment of a note or bill.

When Indorser or Surety Who has Paid may Reissue.—Subject to the restrictions of the rule that persons whose liability on a note has once been discharged by its payment cannot again be made liable thereon, an indorser who has paid the note may reissue it. It is clear "that if the last of successive indorsers were to pay the bill or note to his indorsee, he could reissue the instrument with or without his indorsement remaining upon, and that all parties claiming under his second transfer could sue and recover from all prior parties who remain liable to him, and from him also if his indorsement were upon the instrument": Daniel on Negotiable Instruments, sec. 1238; *St. John v. Roberts*, 31 N. Y. 441; S. C., 88 Am. Dec. 287; *Montgomery R. R.*

Co. v. Trebles, 44 Ala. 258; *Fenn v. Dugdale*, 40 Mo. 63; *French v. Jarvis*, 29 Conn. 348. A very clear case upon this question is *Kirksey v. Bates*, 1 Ala. 303, 311. In this case the court reason as follows: "The note on this case was indorsed by Robertson and discounted at the bank; at its maturity, the makers of the note not having provided funds for its payment, Robertson was compelled to take it up with his own funds, and to protect his own credit; and afterwards indorsed it to the plaintiffs below. This was no extinguishment of the note. Until a bill or note has been paid by the maker or acceptor, it has not discharged its functions, and may be reissued after it is due and after it has been paid by an indorser: See *Byles on Bills of Exchange*, 97; and *Callow v. Lawrence*, 3 Maule & S. 97. The discount of the note by the bank is in effect nothing more, so far as this question is concerned, than a borrowing by Robertson of the amount due on it, by a pledge of the note with his guaranty; and as it could have been indorsed before such a transaction, it is manifest it could be afterwards." To the same effect is the rule of *Davis v. Miller*, 14 Gratt. 5, where Moncure, J., says: "Payment of a dishonored note by an indorser does not extinguish its negotiability as to him and all parties liable thereon to him; though it discharges the liability of subsequent indorsers, whose liability will not be revived by his putting the note again in circulation." In *Rockingham Bank v. Cluggett*, 29 N. H. 292, it was held that if a joint and several promissory note be taken up by one of the sureties, not with the intention to pay or discharge it, but to purchase it, such payment will not be a discharge of the debt, and that an action might be maintained upon it, for the benefit of the real plaintiff in the name of the payee. Where an indorser takes up a promissory note, after it has been dishonored by paying the amount of it to the holder, the transaction is in effect a repurchase of the note, and not a payment of it, and the indorser becomes vested again with all the rights which he formerly had against prior parties on the paper: *French v. Jarvis*, 29 Conn. 347. "The mere fact that a note before its maturity comes in the usual course of business into the hands of the payee, after having been negotiated by him, does not destroy its negotiability, nor defeat the right of a *bona fide* holder to recover against all who are parties to the note at the time it is negotiated to him": *West Boston Savings Bank v. Thompson*, 124 Mass. 515.

PRE-EXISTING INDEBTEDNESS IS GOOD CONSIDERATION FOR ASSIGNMENT OF NEGOTIABLE PAPER: *Citizens' Bank v. Payne*, 89 Am. Dec. 650, and note.

CITY OF CHICAGO v. MARTIN.

[49 ILLINOIS, 241.]

EXEMPLARY DAMAGES ARE NEVER ALLOWED except where gross fraud, malice, or oppression is shown; and in the absence of these elements, damages should be confined strictly to compensation for the injury sustained.

COMPENSATORY DAMAGES FOR CAUSING PERSONAL INJURIES are to be measured by the loss of time during the cure, the expense incurred in respect thereto, the pain and suffering undergone by the plaintiff, and the pecuniary loss consequent upon any permanent injury.

MUNICIPAL CORPORATIONS ARE LIABLE FOR COMPENSATORY DAMAGES only, except in cases of malice or willful negligence, which elements, it seems, can scarcely be attributed to such bodies.

MUNICIPAL CORPORATIONS MAY EXERCISE DISCRETION as to the time of making repairs in streets which are little used by the public, and are not in a business portion of the city; and in an action for damages for a personal injury sustained by a traveler upon such a street, by reason of a defect therein, the corporation cannot be held guilty of gross negligence so as to subject it to liability for exemplary damages because of its mere failure to make the necessary repairs.

CASE by Bridget Martin against the city of Chicago, for damages for personal injuries alleged to have been caused by defendant's neglect to keep in repair one of its public streets. Verdict for the plaintiff for one thousand dollars. Defendant appealed.

S. A. Irvin, for the appellant.

George A. Parker, for the appellee.

By Court, BREESE, C. J. There was probably some degree of negligence in the city to permit this defect in the culvert to remain so long, but that thereby it was guilty of gross negligence, amounting to willful injury, cannot be admitted. This work was on a street in the city, but not in the business part of it,—rather in the outskirts, which localities have never been supposed to demand, and certainly do not receive, the same attention as more populous and fashionable localities. And it is right and just that it should be so. The city authorities of Chicago should take more care of Lake or State street than they should of streets in the remotest additions to the city, which, though portions of the city, may not be populous or business portions, and therefore not demanding the same care. Such was the street in question, and the defects in which, when the accident occurred, were visible to every one, and where the injury received was of a very slight character. To instruct the jury, under such circumstances, as the court did, in the fifth instruction for the plaintiff, was erroneous. That instruction told the jury, if they found for the plaintiff, they might give exemplary or punitive damages, in addition to the damages for pain and suffering, if they believe, from the evidence, the city was guilty of gross and willful negligence in not keeping this street in reasonable repair at the point where the injury was received.

This instruction, doubtless, produced the large verdict of one thousand dollars for a sprained wrist and a slight hernia.

And how could the city be charged with a willful injury in this case, for gross negligence amounts to that? There is no

evidence in the record to sustain such a charge. The neglect to repair this street was not, under the circumstances, gross or willful. It was an unimportant street, not demanding or entitled to the special care of the city, other more important matters demanding their care and the expenditure of the money drawn from labor by taxation.

That, in a proper case, a jury may give exemplary or punitive damages, as they are called, will be admitted. If a trespass is committed, wantonly or maliciously, upon real property, it has been held vindictive damages may be given: *Pickens v. Towle*, 43 N. H. 220; but whether they should give them or not, is a question which should be submitted, with proper instructions, to the jury. The mere pecuniary inquiry received is not in such cases the full measure of damages. The intention with which the act was done is to be regarded. In *Merest v. Harvey*, 1 Marsh. 139, S. C., 1 Eng. Com. L. 230, which was for trespass for breaking and entering the plaintiff's close, treading down his grass and hunting for game, it appeared the defendant refused to leave when notified, and used insulting language to the plaintiff. It was held a verdict for five hundred pounds was not excessive. Gibbs, chief justice, said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?" So in trespass *de bonis asportatis*, it was held, in *Treat v. Barlon*, 7 Conn. 279, that the jury were not bound by the mere pecuniary loss sustained by the plaintiff, but may award damages for the malice and insult attending a trespass. Generally, where gross fraud, malice, or oppression appears, the jury are not bound to adhere to a strict line of compensation, but may, in the shape of damages, impose a punishment on the defendant, and make an example to the community. These are the elements of vindictive actions, so called, in which juries are allowed to give such damages as shall not only compensate the plaintiff, but operate as a punishment to the defendant, and tend to deter him and others from the commission of similar enormities: *Grable v. Margrave*, 3 Scam. 373 [38 Am. Dec. 88]; *McNamara v. King*, 2 Gilm. 432; *Hosley v. Brooks*, 20 Ill. 115 [71 Am. Dec. 252]; *Bull v. Griswold*, 19 Id. 631; *Ously v. Hardin*, 23 Id. 403; *Footo v. Nichols*, 28 Id. 486; *Hawk v. Ridgway*, 33 Id. 473; *Best v. Allen*, 30 Id. 30 [81 Am. Dec. 338]; *Ball v. Bruce*, 21 Id. 161.

In theory, damages are given as compensation for the injury; and the allowance of punitive damages is a departure from

the rule which once obtained both in England and in this country, yet it has become, by repeated decisions, a settled principle in the law, and there is no corrective but the legislature.

This court is not disposed to extend this principle, and embrace within it the mere negligence of a municipal corporation, who must necessarily have a discretion as to the time when they will repair a defect in a street not much used, and not in a business part of the city. We do not think this case falls within the class where exemplary damages can be given for gross negligence merely. To justify such damages, the act must be willful, or the negligence must amount to a reckless disregard of the safety of persons or property. We have found some cases expressing a different view, but in the doctrine of which we are not inclined to concur. One is the case of *Whipple v. Walpole*, 10 N. H. 130, where it was held, in an action for damages arising from a defect in a bridge which the defendants were bound to repair, exemplary damages might be given, in case the defendants had been guilty of gross negligence. The other cases were: *New Orleans etc. R. R. Co. v. Hurst*, 36 Miss. 660 [74 Am. Dec. 785], and *New Orleans etc. R. R. Co. v. Bailey*, 40 Id. 395; *Vicksburg and Jackson R. R. Co. v. Patton*, 31 Id. 156 [66 Am. Dec. 552]; *Bowen v. Lane*, 3 Met. (Ky.) 311, the appellant being the owner of a railroad.

The case in 36 Mississippi, *supra*, shows most clearly, if correctly decided, there is no limit to which a jury may not go in awarding exemplary damages. There the plaintiff was carried four hundred yards beyond a station, and the conductor, refusing to return, put him off, so that he had to walk back with his valise to the station; the jury awarded him four thousand five hundred dollars, which the court refused to set aside, saying "the law in such cases furnished no legal measurement, save the discretion of the jury!"

We prefer the doctrine of the supreme court of Missouri in *Kennedy v. North Mo. R. R. Co.*, 36 Mo. 351, that to authorize the giving of exemplary or vindictive damages, either malice, violence, oppression, or wanton recklessness must mingle in the controversy. The act complained of must partake of a criminal or wanton nature, else the amount sought to be recovered must be confined to compensation.

This court has never sanctioned the doctrine contained in this instruction, and would be very unwilling to follow those

courts which do. The cases referred to by appellees' counsel, as decided by this court, do not bear upon this point at all. They merely say that if a wrong instruction has been given, it does not follow the judgment will be reversed, if from the whole record it is manifest substantial justice has been done. The furthest this court has gone in this direction was in the case of *Peoria Bridge Association v. Loomis*, 20 Ill. 236 [71 Am. Dec. 263], not cited by appellees' counsel, where we said, *arguendo*, that a jury might give exemplary damages in cases of willful negligence or malice, if the proof exhibits such a state of case, and that to constitute willful negligence, the act done or omitted must be the result of intention, and that mere neglect could not ordinarily be ranked as willfulness, and then the court proceed to lay down the rule of damages for personal injuries resulting from the negligence of others. We say they must be measured by the loss of time during the cure, and expense incurred in respect of it, the pain and suffering undergone by the plaintiff, and any permanent injury, especially when it causes a disability for further exertion, and consequent pecuniary loss. *Hunt v. Hoyt*, 20 Ill. 544, is to the same effect.

It is scarcely conceivable that a case could be made against a municipal corporation, justifying punitive damages, and it is of such we are treating. The city is not a spoliator, and should not be visited by vindictive damages. Where aggression and malice are absent, the damages cannot exceed compensation for the injury done; in other words, they cannot be punitive: *Toledo etc. R'y Co. v. Arnold*, 43 Ill. 419.

For the error in giving the fifth instruction, the judgment is reversed, and the cause remanded for further proceedings, consistent with this opinion.

Judgment reversed.

EXEMPLARY DAMAGES, ALLOWANCE OF IN GENERAL: See the note to *Austin v. Wilson*, 50 Am. Dec. 767-775; and also the note to *Hagan v. Providence etc. R. R. Co.*, 62 Id. 379; see also *Southern R. R. Co. v. Kendrick*, 90 Id. 332, and prior cases in the series cited in the note. To authorize the giving of exemplary damages, the act causing the injury must partake of a criminal or wanton intent, or be accompanied by malice or violence: *Toledo etc. R'y Co. v. Patterson*, 63 Ill. 307; *Drohn v. Brewer*, 77 Id. 283, both citing the principal case.

WHAT FACTS MAY BE CONSIDERED IN ESTIMATING DAMAGES in action for personal injuries: See *Southern R. R. Co. v. Kendrick*, 90 Am. Dec. 331, and note citing other cases.

RECOVERY OF EXEMPLARY DAMAGES AGAINST MUNICIPAL CORPORATION: See note to *Hagan v. Providence etc. R. R. Co.*, 62 Am. Dec. 389. In *Indianapolis v. Gaston*, 58 Ind. 232, the principal case is cited generally as an authority on the law of damages in actions against municipal corporations. In *City of Decatur v. Fisher*, 53 Ill. 408, citing the principal case, it is held that a municipal corporation is not to be held liable for more than compensatory damages, unless, as in the case of individuals, it is proved that the injury was willful, which is scarcely possible in the case of such a corporation. But while not liable for vindictive damages, the jury may, in estimating the compensatory damages, consider loss of time, expenses, pain, and suffering, and loss by permanent injuries: *Chicago v. Jones*, 66 Id. 351, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Aurora v. Pulfer*, 56 Ill. 273, to the point stated in the fourth syllabus.

RACINE AND MISSISSIPPI RAILROAD COMPANY v. FARMERS' LOAN AND TRUST COMPANY.

[49 ILLINOIS, 331.]

CORPORATION, ACTING WITHIN SCOPE OF ITS AUTHORITY, will be bound by a parol contract made by its authorized agent, to the same extent as an individual would be bound under similar circumstances.

CONSOLIDATION OF STOCK OF CORPORATION created by laws of one state with that of one created in another state will not constitute the corporations thus consolidating one corporation of both or either of the states, but each continues a corporation of the state creating it, although the same persons, as officers and directors, control both as one body.

IF CORPORATIONS OF DIFFERENT STATES, BY PERMISSION OF LEGISLATURES, CONSOLIDATE into one corporation, and as such mortgage the property belonging to one of the consolidated companies, such mortgage is the sole mortgage of said company, and not of all the consolidated companies, and is legal and valid.

IN SUIT TO FORECLOSE MORTGAGE, EXECUTED BY CONSOLIDATED CORPORATION consisting of several corporations created by the laws of different states, upon the property of one of these companies, the question as to the validity of the consolidation contract cannot be raised by the defendant. Having mortgaged the property, it will not be permitted to deny its own title.

PURCHASER UNDER DECREE IN SUIT TO FORECLOSE MORTGAGE acquires only such title as the mortgagor had at the time of the mortgage; and third persons, not made parties to the suit, and claiming an interest in the property included in the mortgage, are not affected by the decree, and may afterwards assert their rights in such property.

LEGISLATURE MAY VALIDATE AND CONFIRM CORPORATION and its acts, where it was irregularly organized; and this applies where several corporations, created by the laws of different states, consolidate by authority of the legislatures, but in making the contract of consolidation, fail to pursue the terms of their authority. The confirmation of the contract actually made, by legislative act, recognizes the legal existence of the corporation named in the act.

PERSON TAKING ENTIRE CONTROL AND MANAGEMENT OF CONSOLIDATED CORPORATION, consisting of several corporations created by laws of different states, and conducting the same as one company for the better security and protection of a mortgagee of some of the corporate property, thereby becomes a trustee, not only for the mortgagee, but also for the mortgagor corporations; and his purchase of the trust property at a foreclosure sale under another mortgage will inure to the benefit of the *cestuis que trust*, upon his being reimbursed the amount of his bid, with interest. And as such trustee, he is bound to account; and it is error to hold that the right of the mortgagor corporation to an accounting will depend on the redemption from the sale to such trustee under the second mortgage.

IN SUIT AGAINST TRUSTEE OF CORPORATE PROPERTY, who is managing it for the protection of a mortgagee thereof, to compel an accounting, the decree should be that the account be first taken and stated, and that a reasonable time be given for redemption from a sale to the trustee under a second mortgage, and for payment of such balance as should be found due upon the first-mortgage debt, after deducting the net earnings of the property; and that in default of such redemption and payment being made, the property be sold in satisfaction of the first-mortgage debt.

IN ACCOUNTING BY TRUSTEE WHO HAS MANAGED PROPERTY of mortgagor railroad corporation for the protection of the mortgagee, the mortgagor corporation is entitled to a credit for the earnings of a line of road which had been constructed by such trustee, with money furnished by the mortgagee, along the line of the road owned by the mortgagor, and which, by its contiguity to the latter road, rendered it less valuable than it would otherwise have been.

WRIT of error. The opinion states the facts.

Knowlton and Jamieson, for the plaintiffs in error.

Thomas J. Turner, for the defendants in error.

By Court, LAWRENCE, J. On the 17th of April, 1852, the legislature of the state of Wisconsin passed an act incorporating the Racine, Janesville, and Mississippi Railroad Company, with power to construct a railway from Racine, on Lake Michigan, to the Mississippi River. The company was duly organized November, 1852. By an act of the legislature of Wisconsin, approved June 27, 1853, the company was authorized to build a branch road to Beloit, a town on the line between Wisconsin and Illinois; and by another act, approved July 9, 1853, the company was authorized to connect its road at Beloit with any railroad then chartered, or thereafter to be chartered, in the state of Illinois, and to consolidate its stock with the stock of such Illinois road, and place the road under a joint board of directors, to be chosen as the consolidating companies should agree.

The legislature of the state of Illinois, by an act approved February 10, 1853, incorporated the Rockton and Freeport Railroad Company, with power to build a railroad "from a point on the north line of the county of Winnebago, through the village of Rockton, to Freeport, in Stephenson County." The company was authorized to consolidate its stock with that of any Wisconsin company that had been or might thereafter be incorporated by the legislature of that state, running from the terminus of said road in the direction of Lake Michigan.

On the 23d of February, 1854, these two companies entered into articles of agreement, the object of which was declared in the concluding article to be "to fully merge and consolidate the capital stock, powers, privileges, immunities, and franchises of the Rockton and Freeport Railroad Company with the Racine, Janesville, and Mississippi Railroad Company."

On the 13th of February, 1855, the legislature of Illinois changed the name of the Rockton and Freeport Railroad Company to the Racine and Mississippi Railroad Company, and on the 31st of March, of the same year, the legislature of Wisconsin changed the name of the Racine, Janesville, and Mississippi Railroad Company to the Racine and Mississippi Railroad Company.

We will now state the facts in regard to a third road which ultimately was consolidated with the Racine and Mississippi.

On the 21st of January, 1851, the Savanna Branch Railroad Company was organized under the general railroad law of Illinois, for the purpose of building a road from Savanna, on the Mississippi River, in an easterly direction, to intersect the Galena and Chicago Union railroad at a point in Stephenson County, not exceeding fifteen miles from the town of Freeport. On the 12th of February, 1851, the legislature passed an act authorizing the company to build the proposed road, and for that purpose, to condemn private property, thus recognizing the existence of the corporation. On the 23d of January, 1856, this company entered into articles of agreement with the Racine and Mississippi Railroad Company, by which its stock was consolidated with the latter company, and a majority in interest of the stockholders of the Savanna company gave their written ratification of the articles. On the 14th of February, 1857, the legislature of Illinois passed an act changing the name of the Savanna Branch Railroad Company to the Racine and Mississippi Railroad Company, and confirming and declaring legal and binding the acts of consolidation

entered into between the Rockton and Freeport company and the Racine, Janesville, and Mississippi company, and those between the Savanna Branch company and the Racine and Mississippi company.

Prior to this time, and on the 1st of September, 1855, the Racine and Mississippi Railroad Company had executed and delivered to the Farmers' Loan and Trust Company, a corporation existing in the state of New York, 680 bonds of one thousand dollars each, payable to said loan and trust company or bearer, and to secure their payment, had executed a mortgage upon so much of their road as was situate in Wisconsin, extending from Racine to Beloit.

Subsequent to the above-named act of confirmation, and on the 24th of April, 1857, the Racine and Mississippi Railroad Company executed to the same Farmers' Loan and Trust Company seven hundred additional bonds, of one thousand dollars each, and on the same day, to secure the payment of said bonds, executed to said loan and trust company a mortgage upon all its road in the state of Illinois, extending from Beloit, on the Wisconsin line, to Savanna, on the Mississippi River. The mortgage recited that the company was engaged in the construction of a railroad from Racine to Beloit, in Wisconsin, and from Beloit to Savanna, in Illinois. These bonds and mortgage bore date June 2, 1856, but the bonds were not sold, nor the mortgage acknowledged, until April 24, 1857, after the passage of the confirmatory act. It is to foreclose this mortgage that the present suit is brought.

It should be further stated, the Farmers' Loan and Trust Company, on the 3d of December, 1858, filed their bill in the circuit court of the United States for the district of Wisconsin, against the Racine and Mississippi Railroad Company, to foreclose the mortgage given on that portion of the road situate in Wisconsin, to secure the issue of bonds first above named; and on the tenth day of May, 1859, pending that suit, the railroad company executed to the loan and trust company a deed of surrender of the entire road. The road was then fully completed in Wisconsin, and about twenty miles were finished in Illinois. After taking possession, the loan and trust company proceeded to complete the road to Freeport, as it was authorized to do by the deed of surrender, and it was opened for business on the 1st of September, 1859, having remained from that time to the present under the undisputed control of the loan and trust company. George A. Thomson, a party in this

suit, acted as agent of said trust company in the management and control of said road.

After the execution of said deed of surrender, and in pursuance of its terms, a decree of foreclosure was pronounced in the then pending suit, giving the railway company five years from the completion of the road to Freeport in which to redeem said property, and providing that if no redemption should be made, the court should proceed to make such other and further decree in the premises as might be necessary. No redemption having been effected on the 31st of March, 1865, the Farmers' Loan and Trust Company filed their petition in said court, setting out in full their disbursements and receipts, and praying a decree of sale. An account was stated by the master in chancery, which was approved by the court, and a decree of sale was pronounced, under which George A. Thomson became the purchaser of the Wisconsin division of the road.

In order to comprehend certain questions arising upon the record, it is necessary to state some further facts.

On the 27th of June, 1857, the Racine and Mississippi Railroad Company executed to Morris K. Jesup and Curtis B. Raymond, seven hundred bonds for one thousand dollars each, and to secure their payment, also executed a mortgage upon the entire line of road from Racine to Savanna. This mortgage was made expressly subject to the above-named mortgages to the loan and trust company on the Wisconsin and Illinois divisions of the road. On the 26th of December, 1859, Jesup and Raymond filed a bill in the circuit court of Walworth County, in the state of Wisconsin, to foreclose this mortgage, and the Wisconsin portion of the road was subsequently sold under a decree rendered in said suit to said Morris K. Jesup, for two hundred and seventy thousand dollars. Jesup subsequently conveyed the title thus acquired to Richard Irvin and George A. Thomson, and Irvin afterwards conveyed to Thomson. On the 2d of December, 1863, Jesup and Raymond filed their bill in the circuit court of the United States for the northern district of Illinois, to foreclose their mortgage upon that portion of the road situate in Illinois. The court found the sum of \$859,362 to be due said Jesup and Raymond, and pronounced a decree of sale under which the Illinois division of the road was sold and conveyed by the master in chancery to George A. Thomson for \$70,000, and the sale was approved by the court.

That portion of the road running from Freeport westward to the Mississippi was never completed in the name of the Racine and Mississippi Railroad Company, but on the 24th of February, 1859, the legislature of Illinois incorporated the Northern Illinois Railroad Company, with power to build a road from Freeport to the Mississippi. The company was organized in 1860, and George A. Thomson, then managing the Racine and Mississippi road, as agent of the loan and trust company, and therefore under the deed of surrender, occupying a fiduciary relation to the Racine and Mississippi company, subscribed to all the stock of the Northern Illinois Railroad Company, except three thousand eight hundred dollars, and became the president. He then proceeded to build the road from Freeport to Savanna, in the name of the Northern Illinois Railroad Company, at no place diverging more than three miles from the track of the Racine and Mississippi company, and in places occupying its very track, which had been partially graded. This road was built with money obtained from the holders of the bonds of the Racine and Mississippi company, secured by the mortgages to the loan and trust company.

After the road was completed it was leased to the loan and trust company, and operated by it through Thomson as its agent, in connection with the line of the Racine and Mississippi road.

Such are the substantial facts necessary to a comprehension of this case.

To this bill of foreclosure, which was filed in the circuit court of Stephenson County, on the 31st of December, 1864, the Racine and Mississippi Railroad Company filed their answer, and subsequently filed a cross-bill and an amended cross-bill, to which it made George A. Thomson and the Northern Illinois Railroad Company parties. It prayed in the cross-bills, not only for the cancellation of the bonds and mortgage given to the loan and trust company, upon which this suit is brought, and of the sale and deed to Thomson under the foreclosure of the Jesup and Raymond mortgage, but also that the court should decree the Northern Illinois railroad to have been built in violation of its rights and franchises, by parties occupying a fiduciary relation towards itself, and that an account might be taken with said railway company, and such relief given as the case might require. Answers were filed to the cross-bills, and the original cause

and the cross-cause having been brought to issue, and a great amount of proof taken, they came to a hearing, and the court pronounced a decree directing a sale of the road for the amount due upon the bonds, and authorizing the Racine and Mississippi Railroad Company to redeem from the sale to Thomson, under the Jesup and Raymond mortgage, by repaying the seventy thousand dollars which he had paid the road, and interest thereon, and also directing an account to be taken with the Northern Illinois Railroad Company for the benefit of the Racine and Mississippi company, provided the latter should first redeem from Thomson by paying the seventy thousand dollars, and interest, within ninety days from the decree. It was further decreed that if the Racine and Mississippi company should fail to redeem within the ninety days, the Northern Illinois company need not come to an account, and the road of the Racine and Mississippi company should be sold at once in payment of the amount found by the court to be due upon the loan and trust company bonds; but should redemption be made from Thomson within the ninety days, no sale should take place until the statement of an account by the master with the Northern Illinois Railroad Company, and the net profits earned by said company should apply as a credit on the bonds secured by the mortgage held by the loan and trust company, and produced in this suit.

To reverse this decree, the Racine and Mississippi Railroad Company has prosecuted a writ of error.

It is urged by the counsel for plaintiff in error, that the consolidation contracts above named were void, that they were not aided by the confirmatory act of the legislature, and that therefore the corporation known as the Racine and Mississippi Railroad Company is merely a Wisconsin corporation, and has had no legal existence in Illinois. It is urged that this mortgage is merely a mortgage made by a Wisconsin corporation upon property in Illinois, to which it has no title, and over which it can rightfully exercise no control. It is further urged that, even if the contracts of consolidation were not void, and if the Racine and Mississippi Railroad Company had a legal existence in Illinois, nevertheless it had no power to make this mortgage. These objections we will consider.

It is first insisted that the contract between the Rockton and Freeport Railroad Company and the Racine, Janesville,

and Mississippi Railroad Company was void, because not under the corporate seal; but the ancient doctrine of the common law, that a corporation could speak and act only by its corporate seal, has long since been exploded, and it is now too well settled, in this country, to need any citation of authorities, that a corporation, acting within the scope of its legitimate authority, is as much bound by a parol contract made by its authorized agent as a natural person would be under like circumstances: 2 Kent's Com. 288. In this case, the Rockton and Freeport company, by a resolution of its board of directors, had expressly authorized this contract to be made, and it was subsequently carried into complete execution by both companies, and thus ratified as completely as ratification could be made.

It is further urged that the Rockton company was authorized by its charter to consolidate its stock only on condition that the consolidated stock should be placed under the control of the board of directors of the Rockton company, whereas, by the contract actually made, the control was given to the directors of the Wisconsin company. The Rockton and Freeport company did not thus construe its charter, for in the third article of the contract, in which the control is given to the Wisconsin board, reference is especially made to the tenth section of the charter as giving authority so to do; and on reference to that section we are of opinion the company was correct in its construction. That section is as follows:—

“Section 10. It shall be lawful for the said company to unite with any other railroad company which may have been, or may hereafter be, incorporated by the state of Wisconsin, and running from the terminus of said road in a direction towards Lake Michigan, and to grant to such company the right to construct and use all or any portion of the road hereby authorized to be constructed; also the right to purchase or lease all or any part of said road; also the right to sell, lease, or convey the same to said company, or consolidate its stock therewith, and place the management and control of the same under said board of directors, upon such terms as may be mutually agreed upon between the said railroad companies.”

It will be perceived that this entire section is very awkwardly worded, but we are of opinion the company was correct in construing the concluding paragraph as designed to authorize it to place the management of its stock under the board of directors of the Wisconsin company, with which it might consoli-

date if it should think proper so to do. The phrase "said board of directors" is improperly used, as no board had been mentioned, but we construe it as referring to the Wisconsin company mentioned in the same clause of the sentence.

These are all the objections to the contract between the Rockton and Wisconsin companies we deem it necessary to notice.

The contract of consolidation between the Savanna Branch Railroad Company and the Racine and Mississippi company, was made under the authority of the general law in regard to the consolidation of the stock of railway companies, approved February 28, 1854. That act authorizes companies in this state, where roads intersect by continuous lines, to consolidate their stock, and also to consolidate with companies out of the state, when their lines should connect.

It is objected by counsel for plaintiff in error that this contract of consolidation was made between the Savanna Branch company on the one side, and the Racine and Mississippi Railroad Company on the other, by a contract which describes the latter company as "a corporation existing under an act of the legislature of the state of Wisconsin," and that the lines of the two companies did not connect, and therefore they could not consolidate. But *falsa demonstratio non nocet*. It must be remembered that prior to this date the legislature of Illinois, acting upon the consolidation contract between the Rockton and Freeport company and the Racine, Janesville, and Mississippi company, had changed the name of the former to the Racine and Mississippi company, and the legislature of Wisconsin had done the like for the latter company. The stock of the two companies had been consolidated under a common board of directors, and with a common name, and it was with this board of directors that the contract of the Savanna Branch company was made. It is wholly immaterial that the contract described the Racine and Mississippi Railroad Company as a corporation existing under the law of Wisconsin. It existed equally under the laws of Illinois, and the board of directors who made the contract of consolidation represented, in so doing, a corporation deriving its existence from the laws of Illinois, as well as one deriving its existence from the laws of Wisconsin. It is immaterial that the contract gave only a partial description of the source of their authority, and it is idle to claim that they intended to contract only for the Wisconsin corporation. A separate consolidation

with the stock of the Wisconsin company was impossible, because the stock of that company had already been consolidated with that of the Illinois company of the same name. It was with the consolidated stock of these two companies that the stock of the Savanna road was intended to be consolidated by this contract, and this intent was in fact carried into execution.

But it may be said, even if the contract with the Savanna company should be considered as having been made as much with the Racine and Mississippi company of Illinois as with the Racine and Mississippi company of Wisconsin, it was illegally made, because of a non-compliance with the requirements of the statute pointing out the mode by which Illinois companies may consolidate with each other.

We do not propose to discuss this question, for it is clear, so far as concerns the right of the loan and trust company to a foreclosure of its mortgage, it is wholly immaterial whether this contract with the Savanna company was executed in compliance with the requirements of the statute or not. We have already stated there was in existence, when this mortgage was made, an Illinois corporation under the name of the Racine and Mississippi Railroad Company; and we have held this corporation to have been legally constituted by the contract between the Freeport and Rockton company with the Wisconsin company, and by the subsequent act of the legislature, changing the name of the old corporation to that of the new. The existence of this corporation was wholly independent of all contracts with the Savanna company. With this corporation the stock of the Savanna company was subsequently consolidated, as a matter of fact, and this mortgage was made covering the entire road. Now, suppose this consolidation to have been illegal. That surely would not affect the validity of the mortgage as to so much of the road as the Racine and Mississippi company rightfully owned. Its mortgage would certainly be good to the extent of its own road, from Beloit to Freeport; and whether it created a valid lien over the road from Freeport to Savanna is a question which the courts must be prepared to decide whenever called upon by the original owner of said road, the Savanna Branch company, or by any stockholder therein, but which certainly, in this proceeding, is a question which the Racine and Mississippi Railroad Company cannot raise. Whether it had an interest in the road from Freeport to Savanna, subject to mortgage or not, it as-

sumed to have, and made a mortgage upon it, and whatever interest it had, the mortgagee is entitled to have sold. If the contract of consolidation with the Savanna company was defective in the beginning, and if the defects have not since been cured, that company, or its stockholders, may assert their right to said road whenever they shall think proper; and they will not be prejudiced by the decree in the present case, because neither that original company as a corporation nor its individual members are parties to this suit. All that the purchaser under a decree in this suit will acquire at the sale will be such title as the Racine and Mississippi company had power to mortgage at the time, or as it has been since recognized as having had in such way as to include interested parties. But the Racine and Mississippi company cannot be permitted to set up, as a defense to a bill of foreclosure, that it had no title to the property which it has itself mortgaged. In such a proceeding, the mortgagor is not permitted to deny his own title: *Barbour v. Haines*, 15 Wend. 618; *Dew v. Van Ness*, 10 N. J. L. 102.

It may also be remarked that the argument of counsel for plaintiff in error, that the consolidation contract with the Savanna company was illegally made, is wholly inconsistent with the claim made in the cross-bill, and upon which relief was granted in the decree, that the building of the road from Freeport to Savanna by the Northern Illinois company was a violation of the rights of the Racine and Mississippi company. The latter company had no rights west of Freeport, except as they were acquired by a consolidation with the Savanna company. Practically, it would seem to be for the interest of the Racine and Mississippi company to have the contract with the Savanna company pronounced valid, and its right to an account against the Northern Illinois company thus established, since it has itself never built the road westward from Freeport, and there is nothing to be sold in any event upon the line of the road between Freeport and Savanna, under a foreclosure decree, except a naked and probably worthless franchise.

But there is another view of this branch of the case similar in principle to that just presented, but assuming that both contracts of consolidation were void, which we deem too important to pass over in silence. As already stated, the legislature subsequently confirmed both contracts, and changed the name of the Savanna company to the Racine and Missis-

ssippi Railroad Company as it had already changed that of the Rockton company. We shall not now stop to consider to what extent the legislature can cure defects in the contracts of corporations. It is sufficient for the present purpose that the legislature by this act recognized the Racine and Mississippi Railroad Company as an Illinois corporation created by the merger or consolidation of what had been the Rockton and Freeport company with the Savanna Branch company. Even, then, if both contracts of consolidation had been beyond the power of these companies to make, yet those contracts, and their practical execution by the companies, united to the confirmatory act of the legislature, gave to the Racine and Mississippi Railroad Company at least a colorable legal existence as an Illinois corporation. That it was a corporation *de facto* cannot be denied, as the stock of the old companies had been exchanged for the consolidated stock of the Racine and Mississippi company, and this company was in full possession and control of the road, and proceeding in its construction without a whisper, so far as appears, either on the part of any member of the original corporations, or of any other person, that it was not the rightful owner.

In this condition of affairs, this company having a corporate name which the legislature had given it, claiming to be a legal corporation, and having, even if the articles of consolidation had been illegal, at least a colorable right to make such claim, controlling and building a railway as an organized corporation, and asserting the right to condemn land for its corporate purposes, issues its bonds to the amount of seven hundred thousand dollars, and sends them on the markets of the world. To secure their payment it issues a mortgage upon the road it claims to own, and is engaged in building, and in both bonds and mortgage describes itself as a corporation existing under the laws of Wisconsin and Illinois. The bonds go into circulation, and the money which has been received for them passes into the treasury of the company, and is expended upon the construction of the road. In process of time, the coupons upon the bonds are left unpaid, and the holders come and demand their money. To this demand the company replies that although it issued the bonds and mortgage as a corporation, and thus procured the money, yet it was not a legally constituted corporation, and therefore will not pay the money, but will retain the road.

The doctrine of equitable estoppel has so often been ex-

pounded by the courts that it needs neither definition nor the citation of authority. In our judgment, a clearer case than this for its application has rarely arisen. We are not saying that a corporation is estopped by its bonds and mortgage from raising the question as to whether, in making them, it was acting within its chartered powers. The question whether the mortgage now under consideration was within the power of the company to make, we shall presently consider. But we do say that where a company has issued its bonds and mortgage under the circumstances above detailed, the courts of every civilized country must hold it estopped from denying its own corporate existence, for such a defense is repugnant to every sentiment of justice and good faith. That this doctrine of equitable estoppel, or estoppel *in pais*, by which a person who has represented to another the existence of a certain state of facts, and thereby induced him to act on the faith of their existence, is concluded from averring against such person and to his injury that such representations were false, is as applicable to corporations as to natural persons, will hardly be denied: *Hall v. Mutual Fire Ins. Co.*, 32 N. H. 297; and *Zabriskie v. Columbus etc. R. R. Co.*, 23 How. 391

The views we have here set forth are in harmony with those expressed by us in the case of *Mitchell v. Deeds*, 49 Ill. 416 [*post*, p. 621], in which the validity of certain notes given to this same corporation was under consideration. We there held that irregularities in the consolidation, the stock having been in fact consolidated, could not be set up as a defense in a suit brought upon notes given to the Racine and Mississippi Railroad Company, and we might have contented ourselves with a mere reference to that case, in regard to some of these questions, if counsel had not pressed upon us so earnestly a reconsideration of the views there expressed.

It is urged, however, by counsel for plaintiff in error, that admitting the corporate existence of the plaintiff in error under the contracts of consolidation, and as an Illinois corporation, this mortgage was nevertheless illegal, because the Rockton and Freeport company, by its original charter, was authorized to borrow money only to the amount of two hundred and twenty-five thousand dollars, which was the amount of its stock, and the Savanna company, it is insisted, was not authorized to make a mortgage at all, as it was incorporated under the general law, which gave no authority to mortgage. But

this implied prohibition upon the power of the Rockton and Freeport company certainly had no application to the Racine and Mississippi company, which grew out of the consolidation with the Wisconsin company, as is evident from the third section of the general law in regard to consolidation: Gross's Digest, 532. The power to make the mortgage under this statute, taken in connection with the third section of the act of February 12, 1855, entitled "An act to enable railroad companies to enter into operative contracts and to borrow money" (Gross's Digest, 548), we regard as so clear that it is only necessary to refer to these laws.

We have thus far in this opinion treated the mortgage in question as made by the Racine and Mississippi company of Illinois, while the counsel for plaintiff in error treats it as made by the Racine and Mississippi Railroad Company of Wisconsin, and this error, as we consider it, pervades the whole of his argument in regard to the validity of the mortgage.

Our view of the effect of the consolidation contract between the Rockton company and the Wisconsin company, which we hold to have been legally made, is briefly this: While it created a community of stock and of interest between the two companies, it did not convert them into one company, in the same way, and to the same degree, that might follow a consolidation of two companies within the same state. Neither Illinois nor Wisconsin, in authorizing the consolidation, can have intended to abandon all jurisdiction over its own corporation created by itself. Indeed, neither state could take jurisdiction over the property or proceedings of the corporation beyond its own limits, and, as said by the court in *Ohio etc. R. R. Co. v. Wheeler*, 1 Black, 297, a corporation "can have no existence beyond the limits of the state or sovereignty which brings it into life and endows it with its faculties and powers." In the same case the court say that a corporation cannot be created by the co-operating legislation of two states so as to be the same legal entity in both states, and where two states have each created a corporation with the same name, for the same purposes, and composed of the same natural persons, it must nevertheless be considered as a distinct corporation in each state: See also *Farnum v. Blackstone Canal Corporation*, 1 Sum. 47.

The counsel for plaintiff in error urges upon us the authority of this case, but draws from it the mistaken inference, as we regard it, that even if the contract of consolidation between

the Rockton company and the Wisconsin company was legally made, nevertheless "each retained its former existence, identity, rights, franchises, powers, and privileges." If such had been the fact, the consolidation would have been practically a nullity. But the contract of consolidation, and the subsequent legislation, created substantially a new corporation with a new name, but such corporation, in a legal point of view, was and has remained a distinct corporation in each state, though the two have a common name, common stock, and a common board of directors. There is a Wisconsin corporation under the name of the Racine and Mississippi Railroad Company, and there is an Illinois corporation of the same name, and the original corporations in each state have been transmuted into these.

We have remarked that counsel for plaintiff in error insist the mortgage in question should be regarded as solely the mortgage of the Wisconsin corporation, and is therefore void. But why should it be so regarded? As there was a Racine and Mississippi Railroad Company in each state, and both companies had a common board of directors, a common seal, and consolidated stock, when we find a mortgage executed in this corporate name, by authority of the board of directors, and conveying only the property of the Illinois corporation, can we have any doubt in what capacity the board of directors were intending to act? Would it not be the veriest trifling with good faith and the rights of creditors to permit such board to say they were acting in behalf of the Wisconsin corporation, and therefore their act was null? It would be a melancholy administration of justice that would suffer such a defense. In describing the mortgaging party as a corporation existing under the laws of Wisconsin and Illinois, the scrivener who drew the mortgage fell into the very natural error of supposing that there was one corporation for both states, but this did not vitiate the mortgage. We must look at the intent of the parties, and about that there can be no doubt. The mortgage covers the road in the state of Illinois belonging to the Racine and Mississippi Railroad Company, a corporation of this state. It is executed by the authority of the board of directors of that company, and bears its corporate seal. Does the fact that there is an allied company in Wisconsin, with the same name, seal, and directors, throw any reasonable doubt upon the transaction?

From what we have said, it will be seen we hold there is no

error in that part of the decree which recognizes this mortgage as a valid lien.

The counsel for the plaintiff in error further insist that the court should have set aside the sale under the Jesup and Raymond mortgage, without requiring it to pay the seventy thousand dollars which the purchaser, Thomson, paid at the sale, and interest thereon. But in requiring this payment, the court committed no error. The court held Thomson to occupy such a fiduciary relation to the plaintiff in error that he could not purchase and hold the road against the will of the company. But the rule in such cases is, that the party claiming the benefit of the purchase must refund to the purchaser his outlay: *Hill on Trustees*, 539, and cases cited in notes.

As to the charge of fraud in the decree in favor of Jesup and Raymond, the proof of a fraudulent agreement, and of Thomson's complicity therein, is so vague and unsatisfactory as to furnish no ground for holding the sale a nullity. It is urged that nothing was, in fact, due on that mortgage, but that question was settled by the decree of the federal court.

It is however insisted by the counsel for plaintiff in error that the circuit court of the United States, for the northern district of Illinois, in which the decree was rendered, had no jurisdiction, as the complainants Jesup and Raymond were not citizens of Illinois, and it is urged the defendant was a corporation of Wisconsin. What we have already said disposes of this question. That mortgage, it is true, unlike the one under consideration, covered both the Wisconsin road and the Illinois road. But it was the same in legal effect as if by the contract of consolidation a separate board of directors and a separate organization had been retained for each road, and the proper officers of both roads had united in the execution of the mortgage under the corporate seal of each company. No one would question the validity of such a mortgage, and this is the same thing in substance. Both roads are mortgaged by authority of a board of directors which acts for each road, and the mortgage is the joint instrument of both the Wisconsin and Illinois companies. When the mortgagees sought to enforce their lien against the Wisconsin road, they proceeded in the courts of that state against the Racine and Mississippi company as a corporation of Wisconsin; and when they enforced it against the Illinois road, they proceeded in the federal

court of this district against the Racine and Mississippi company of Illinois.

In dismissing this question of consolidation, it may be remarked that where continuous lines of road passing through different states are consolidated by legislative authority, as we believe is not unfrequently the case, although the consolidated company must from the very nature of a corporation be regarded as a distinct entity in each state, yet the objects of consolidation would be very liable to be defeated, unless the entire line should be placed under one board of directors. The principle that a single corporation cannot be created by the joint legislation of two states, while an irresistible inference from the established law in regard to corporate bodies, is nevertheless a technical and abstract principle; and when adjoining states authorize consolidations, as in the present instance, and the consolidated lines are placed under a common board with a common name and seal, such board will naturally act as if the consolidated lines made but one company; and when their contracts assume that form, the courts must, for the protection of the public and to enforce good faith, hold, as we have done in this case, that the contract is to be construed as made by the corporation of each state in which the subject-matter of the corporation lies; *ut res magis valeat quam pereat*.

It is also insisted that the plaintiff in error, being in possession under the deed of surrender, could not maintain a bill for foreclosure and sale. No authority is cited for this position, and in our opinion there is no good reason for such a rule.

There is however one error assigned for which the cause must be remanded. We have already stated the circuit court found that the Northern Illinois railroad had been built by Thomson with money furnished for that purpose by these bondholders while he and they occupied a trust relation to plaintiff in error, and that this was done in violation of the trust, and to the injury of plaintiff in error. The court thereupon decreed that the plaintiff in error was entitled to a credit upon its bonds for the net profits of this road, and directed that an account be stated by the master, provided the plaintiff in error redeemed from the sale to Thomson under the second mortgage within ninety days, but that no account should be taken in case the redemption was not made.

The directions in the decree as to the mode in which the account should be stated were consented to by counsel for plaintiff in error in open court, as appears by the face of the

decree, and we have not, therefore, examined the questions made upon that portion of the decree. But there was no consent that the taking of the account should be made to depend on redemption from the sale to Thomson within ninety days, and in this provision of the decree we think there was error. Counsel for defendant in error seek to justify it on the ground that the sale and deed to Thomson cut off all the rights of the railroad company, unless it redeems. But such sale and deed did not affect its rights as to the profits of the Northern Illinois company, which accrued prior to the deed from the master to Thomson, and the violation of the trust having been found by the court, the right to a credit for this portion of the profits would be wholly independent of redemption.

But we think further in regard to the profits which have accrued since the deed to Thomson, admitting the railway company would have no right to them if it should not redeem, it was unreasonable, in view of the relation which Thomson sustains to the different parties to this record, that it should be required to redeem in the dark, by paying to Thomson a large sum of money before being permitted to know how much it must pay the loan and trust company, in order to make its first redemption effectual, and save the road. There would have been no hardship to Thomson in having the account taken before the time for redemption should expire, except a little delay, of which he has no right to complain, in view of the position he occupies. But for the consent given to that portion of the decree directing the application of the net profits, it would be a question whether they should not first be applied to the payment of the amount due Thomson. That part of the decree, however, is not before us.

The court should have directed the account to be taken to the time when Thomson obtained his title, and from that date to the taking of the account. The profits during the first period should have been applied as directed in the decree, independently of redemption from the sale to Thomson, and those of the second should be made to depend upon redemption, but a reasonable time should be given to redeem, after their ascertainment.

The cause will be remanded, with directions to the court to modify its former decree in conformity with this opinion.

The costs of this court will be taxed against the defendants in error.

Decree modified.

Subsequent to the filing of the foregoing opinion, further action was had in the case, as indicated in the following additional opinion:—

By COURT. Since the foregoing opinion was filed, the counsel for plaintiff in error have presented a further record, showing that the road has been sold under the decree of the circuit court rendered herein, and he asks this court to direct the circuit court to set such sale aside. This is resisted by the counsel for the defendants in error, and affidavits are filed for the purpose of showing that the road has passed into the hands of innocent purchasers for a valuable consideration.

It is apparent that this question cannot be brought before us in this method. The motion must be made and decided in the circuit court, where the evidence can be heard, and when that court shall have acted, either party can bring its decision before this court for review.

It is, however, proper to say that although in our opinion already filed we have modified, and not wholly reversed, the decision of the circuit court, yet that modification is of such a character that for the purpose of deciding this motion, when it shall be made, the circuit court should consider the decree as having been reversed.

The counsel for defendants in error has, on their part, moved for an amendment in the last paragraph but one of the opinion. As it now stands, the court is directed to take the account against the Northern Illinois Railroad Company, to the time when Thomson obtained his title, and from that date to the time of taking the account. But our attention is now called to the fact that the decree shows the parties consented the account should be taken only to the date of the decree, and this is not denied by the counsel for plaintiff in error. The circuit court will therefore take the account as against the Northern Illinois Railroad Company only to that date.

It is urged, however, in behalf of the defendants in error, that the account against the Farmers' Loan and Trust Company, in regard to the profits of the other portion of the road operated by said company, which account was brought down to the date of the rendition of the decree, should now be brought forward to the time when a new decree shall be rendered. On the other hand, it is claimed that such new accounting should not be required until the plaintiff in error has redeemed from the sale to Thomson, and that in no event should it be brought down to a later date than the date of the master's deed, made

under the decree and sale in this case. We are of opinion the plaintiff in error has a right to have the account stated before effecting a redemption from Thomson, and whether it shall be brought down to the time of stating the account, or shall stop at the date of the master's deed under this decree, will, of course, depend upon whether the court shall set said sale and deed aside.

CORPORATION IS LIABLE FOR ACTS DONE BY ITS AGENTS in the course of its business, and their employment as an individual would be under similar circumstances: *Maynard v. Fireman's Fund Ins. Co.*, 91 Am. Dec. 672, and note.

CORPORATION CHARTERED BY TWO STATES BY SAME NAME AND STYLE, and with same powers, is a distinct and separate body in each state: *Alleghany Co. v. Cleveland etc. R. R. Co.*, 88 Am. Dec. 579, and note.

POWER OF LEGISLATURE TO VALIDATE IRREGULARLY ORGANIZED CORPORATION: See *Mitchell v. Deeds*, ante, p. 621.

TITLE ACQUIRED BY PURCHASER AT FORECLOSURE SALE: See *Boggs v. Fowler*, 76 Am. Dec. 561, and note.

THE PRINCIPAL CASE IS CITED IN *Board etc. v. Lafayette etc. R. R. Co.*, 55 Ind. 107, as an authority containing a discussion of railway trusts. In *Melendy v. Keen*, 89 Ill. 399, it is said that the principal case contains a full account of the consolidation of the several companies which constitute the Racine and Mississippi Railroad Company, and also of the enabling acts under which the consolidation was effected.

RUCKER v. DOOLEY.

[47 ILLINOIS, 577.]

STATUTE REQUIRING SHERIFF, ON PRESENTATION OF CERTIFICATE OF PURCHASE of land sold under execution, to execute a deed to the holder thereof, if the land has not been redeemed, must be construed to mean that the deed is to be so executed if such presentation is made within a reasonable time; and such time must be considered to be the time within which the judgment is a lien, and the fifteen months additional allowed for redemption. One seeking a deed after such time must make application to the court in which the execution was issued for a rule upon the sheriff, on notice to the parties interested, to show cause why the deed should not be executed. But if the application be not made within twenty years, the courts will hold, in analogy to the statute of limitations, and for the protection of titles of *bona fide* purchasers, that such lapse of time will bar the right of the holder of the certificate to have a deed executed.

DEED EXECUTED ON APPLICATION TO SHERIFF BY HOLDER OF CERTIFICATE of purchase, twenty-nine years after the sale on execution, will be set aside as a cloud upon the title of the party in possession, where, in the intervening time, the judgment debtor has conveyed the land, and, by several subsequent conveyances, the title has passed to a remote pur-

chaser for value, and without notice of any lien, who has entered into possession prior to the making of the sheriff's deed.

IN SUIT TO QUIET TITLE, COMPLAINANT IS NOT BOUND TO SHOW a perfect title against all the world, as in a possessory action.

IN SUIT TO QUIET TITLE, IT IS PROPER TO DECREE that the deeds constituting the cloud be set aside and removed; but the court should not decree that the holder of such deed convey his title thereunder to the complainant.

SURT to quiet title. The opinion states the facts.

John G. Rogers and E. A. Rucker, for the appellant.

Wilson and Martin, for the appellees.

By Court, BREESE, C. J. The object of the bill in this case was to quiet the title to a certain tract of land in Cook County, both parties claiming through the same source. The defendants Weston, Davis, and Hambleton had inclosed the land, under their chain of title, in 1867, before the bill was filed, and before the defendant Rucker had received the sheriff's deed on which his claim was based, that deed bearing date January 6, 1868.

It appears the land was sold by the sheriff of Cook County, on a judgment rendered in the municipal court of Chicago, in favor of one Murphy against John K. Boyer and Peter Pruyne, at the November term, 1837. The execution was dated March 22, 1838, and a levy and sale thereon to Henry L. Rucker, the certificate of which bears date July 25, 1838, the sum bid being fifty dollars, and the land being forty acres in section 20, in township 40 north, range 14 east.

H. L. Rucker assigned this certificate, it is alleged, to Joseph W. Rucker, the appellant, some seventeen years after its date, to wit, on the 5th of March, 1855. Appellant took no steps to procure a deed until the 6th of January, 1868, on which day the sheriff of Cook County executed to him a deed for the premises. During all this time, from July, 1838, to January, 1868, the land had passed through several purchasers claiming under Boyer by a regular chain of conveyances, duly recorded, up to John Dooley, the husband and deviser of the appellee, Sarah, when, in 1859, he claimed to be the legal owner. On the 21st of November, 1867, John Dooley sold and agreed to convey the south half of the premises to Weston, Davis, and Hambleton, at a stipulated price, one half of which they had paid. They immediately entered into the possession of the premises, and inclosed them by a fence, with the consent of Dooley.

In the beginning of January, 1868, it appears that one George B. Davis had agreed with Weston, Davis, and Hambleton to purchase three acres of this land, and they furnished him with an abstract of title. On the fourth day of January, Davis laid this abstract before his attorney, Edward A. Rucker, Esq., for examination. On the 6th of January, it is alleged, Mr. Rucker procured, in the name of his brother, Joseph W., the appellant, a sheriff's deed of the premises, and on the next day caused the deed to be recorded, and soon afterwards informed George B. Davis that on examination of the abstract he found he himself was the owner of the premises, and proposed to sell them to Davis. Upon this, the purchasers from Dooley declined to make any further payments, and this bill was filed to remove the cloud thus created by the sheriff's deed. The superior court of Chicago, in which this bill was filed, decreed substantially that this deed was a cloud upon the complainant's title, and set it aside, and ordered a reconveyance from Rucker to Dooley, decreeing that the sheriff had no lawful power or authority to execute such deed, and that the same was fraudulent and void in law.

To reverse this decision, the record is brought here by appeal, and several points are made, which are disposed of by considering this question: Was the sheriff warranted, after the lapse of twenty-nine years, in making the deed to appellant?

The appellant insists that there was no time limited within which the holder of a certificate of purchase was required to take out a deed after he became entitled to it.

There is, it is admitted, no express legislation on this subject; but there are well-established principles of law quite as potential as positive legislation, in the absence of legislation upon the subject.

Secret liens,—such as the certificate of purchase may justly be considered,—no publicity being given to them by recording them, are not favored in law, and are not usually enforced to the overthrow of rights, honestly acquired, without any notice of such liens.

The analogies of the law must be considered with reference to appellant's proposition. By statute, a judgment is a lien upon land for seven years, and then only when an execution has been taken out within a year. A writ of entry is barred after the lapse of twenty years. In *McCoy v. Morrow*, 18 Ill. 518 [68 Am. Dec. 578], this court said that creditors have a

lien in this state against the estate of their deceased debtors for the satisfaction of their debts, which they may enforce through administration, even against purchasers from heirs or devisees; and there is no statute interposing any limitation of time within which the lien must be enforced. The notion that this lien is perpetual, and may be enforced at any time against the land, after alienation by the heir, is wholly inadmissible.

The policy of our law is, to afford notice through public offices and records of liens against lands, and the law will not favor liens of which it has provided no public notice. Nor does the law favor stale demands and rights slept on, until other rights and interests have arisen and become involved, which from lapse of time, and consequent difficulty of proof, may be jeopardized by the setting up and sustaining the former; and in support of rights and possessions long claimed and enjoyed without interruption, the law will presume grants or satisfaction of demands. After the lapse of twenty years, debts of whatever degree are presumed to have been satisfied, and this principle will defeat a recovery on them, unless rebutted by proof. By our statute of limitations, actions for debts are barred in sixteen years, and entry upon and action for the recovery of land held adversely under claim of right for twenty years are barred by our law; seven years also bars entry and action when land is adversely possessed during that time under certain circumstances. This court has held, in analogy to the law requiring an infant whose land has been sold for taxes to redeem the same within three years after becoming of age, that the infant must repudiate his deed within the same period: *Cole v. Pennoyer*, 14 Ill. 159; and *Blankenship v. Stout*, 25 Id. 132. The court concludes by saying: "In short, the policy of our law is repose and security of titles and estates against dormant claims."

This was a case where the creditors of an intestate debtor sought to subject his lands to the payment of their debts, twenty-five years having elapsed before they filed their claims for allowance, and eighteen years after final settlement of administration. In the mean time, and nineteen years after the death of the debtor, the heir conveyed the land by deed duly recorded, before any step had been taken by the creditors to enforce their claims.

The court found against the creditors, and established the title in the vendee of the heir. Without laying down any

definite rule as to what should be a reasonable time within which such creditors should proceed to enforce their lien, the organ of the court, on that occasion, said that "certainty in the law, so necessary to enable the citizen to know his rights of property, by analogy to the lien of judgments and the limitations of entry upon and action for the recovery of lands, requires the application to this case of the fixed period of seven years from the death of the ancestor."

Here, the vendee of the heir at law was protected against a secret lien of creditors, they having suffered it to become dormant by the lapse of eighteen years after final settlement of the estate by the administrator. Pursuing in some degree this same analogy, and for the protection of purchasers for a valuable consideration, without notice of any lien, from the judgment debtor and those claiming under him, we should be inclined to hold after the lapse of twenty years, being the longest time of limitation known to our laws, a sheriff's deed should not be executed to the holder of a certificate of purchase, not under legal disabilities on the application of the holder to the sheriff, nor by any rule or order of court upon him for such purpose; that such lapse of time shall be considered an insuperable bar to its execution. If the application for a deed be made after the eight years and three months have elapsed, and within twenty years, the same must be made through the proper court, by a rule upon the sheriff to show cause, and on notice to parties interested, when the record should show the existence of intermediate purchasers from the judgment debtor, or shall otherwise appear, of the particular lot or tract of land described in the certificate.

Although the statute requires the sheriff, on presentation of the certificate of purchase by the holder thereof, to make a deed to such holder, if the land be not redeemed, it is in the spirit of this enactment that such presentation and demand for a deed shall be made within a reasonable time, and that reasonable time ought to be, and must be, considered as the time in which the judgment is a lien, plus the fifteen months allowed for redemption. After that time the deed must be sought through the court where the judgment rests and from which the execution issued, and the action of the court on the application must depend on the circumstances of each case.

It is not just that a purchaser from a judgment debtor of the land sold under an execution against him, who has bought in good faith, paid a valuable consideration, and having no notice,

actual or constructive, of any lien, and who is in possession, should, after the lapse of years, be disturbed in his possession by setting up a lien which the holder failed to assert in a reasonable time. After the lapse of twenty-nine years no suggestion can prevail in favor of the execution of such deed, to the detriment of intermediate purchasers for a valuable consideration, and without notice.

As this court said in *McCoy v. Morrow, supra*: "There are few greater public misfortunes than insecurity of titles to real property. It paralyzes industry, and destroys that incentive to labor and enterprise which a reasonable certainty of just reward alone will create, and upon which depends the public and private prosperity."

After such a lapse of time, what is the reasonable presumption?—during the whole of which, near thirty years, neither appellant, the judgment debtor, nor any other person, save the complainant in the bill and those under whom he claimed, set up any title whatever to the premises. Is it not a fair and reasonable presumption that the judgment debtor had adjusted this purchase with Rucker, the purchaser, and neglected to take up the certificate? The sum of money to be paid was trifling, compared to the value of the property sold, and when the conduct of men of ordinary prudence and sagacity is considered, the presumption is very strong that the entire matter was adjusted with the purchaser satisfactorily to him years before the execution of this deed. We hear nothing of this claim,—it sleeps the sleep of near the third of a century, and is only asserted when *bona fide* purchasers, without notice, had taken actual possession, by making the most visible marks of ownership, entering under deeds and contracts, which, to that day, had remained unchallenged.

It is objected by appellant that some of the deeds by which appellees connected themselves with Boyer, the common source of title, are obnoxious to objections, and cannot be used in evidence. However that may be, this much is proved and is certain, that Dooley's family were in the actual possession of the premises when appellant took out his sheriff's deed; that Dooley bought, in 1859, under a chain of recorded conveyances running directly back to Boyer, and since that time has claimed the ownership under such chain, and his actual possession under such a chain entitles him to protection against disturbance by such a groundless title as that of the defendant. We do not understand that a plaintiff in a suit to quiet title

is bound to show a perfect title as against all the world, as in the case of a party seeking to recover possession. It is immaterial to defendants who show themselves in no way connected with the property: *Craft v. Merrill*, 14 N. Y. 456.

The court below decided correctly in quieting the title of complainant as against the sheriff's deed to appellant, but we are of opinion it should have stopped there without decreeing a reconveyance to the complainant, and the decree will stand modified to that extent, and in other respects will be affirmed. The costs of this court will be equally divided between the parties.

Decree affirmed.

LIMITATION OF TIME IN WHICH SHERIFF'S DEED MAY ISSUE. — The principal case seems to have been the first upon this topic, and few cases have been decided since. Following the principal case, it has been held that the holder of a certificate of purchase at a sale on execution should make application for a deed within a reasonable time, and that that time would be the period during which the judgment was a lien, together with the period allowed for redemption; and that, after such time, application should be made to the court which issued the execution, upon an order to the sheriff to show cause, and notice to the parties interested: *Harmon v. Learned*, 58 Ill. 169; *Schrader v. Peach*, 78 Id. 615; and then the issuance of the deed will not be ordered if it will do injustice to innocent purchasers without notice: *Schrader v. Peach*, *supra*. In *Cottingham v. Springer*, 88 Id. 97, where a deed issued by the sheriff, after the period above named as reasonable, was sought to be set aside, the court refused the plaintiff the relief asked, because it was not shown that the proper order of court had not been obtained prior to the issuance of the deed. In *Harmon v. Learned*, 58 Id. 169, where a deed was issued by the sheriff, without order of court or notice to the parties, one year after the time for redemption had expired, the court held the deed invalid, and set it aside. And so in *Schrader v. Peach*, 78 Id. 615, where the conveyance was made thirty years after the decree authorizing it, the right of redemption expiring in Illinois at the end of eight years and three months. In *Kruse v. Wilson*, 79 Id. 241, this principle does not apply. That was a case where a sheriff, by mistake, omitted his seal. His successor, several years afterward, executed a new deed to him; and it was held that this deed related back to the time of execution of the old one.

ON BILL TO QUIET TITLE, it is not proper for the court to decree conveyance to the complainant of the title alleged to be a cloud. It is sufficient to remove the deeds which operate as a cloud, and then stop: *Conwell v. Watkins*, 71 Ill. 489.

MITCHELL v. DEEDS.

[49 ILLINOIS, 416.]

LEGISLATURE HAS SAME POWER TO CONFIRM AND VALIDATE an irregularly organized corporation that it has to bring into existence a new one.

UNDER PLEA OF NUL TIEL CORPORATION, EXISTENCE OF CORPORATE BODY is proved by showing an organization in fact, and a user thereunder.

PARTY EXECUTING HIS NOTE TO CORPORATION THEREBY ADMITS its corporate existence; and in order to avoid its payment for want of a party with whom to contract, he must prove that no such body did in fact exist.

BURDEN OF PROVING WANT OR FAILURE OF CONSIDERATION for negotiable instrument is upon the party pleading it, and it also devolved upon him to show that plaintiff, who received the note before maturity, had notice of such defense at the time he received it.

ALL AFFIRMATIVE ISSUES IN CIVIL CASES ARE TO BE PROVED by a preponderance of evidence.

TO CONSTITUTE TRANSACTION FRAUDULENT, there must be a willful misrepresentation of facts, or the suppression of such facts as honesty and good faith require to be disclosed.

REPRESENTATIONS MADE BY OFFICERS OF CORPORATION, to one dealing with it, that the corporation is a legally organized body, when in fact it was irregularly organized, will not render the transaction void for fraud and misrepresentation, where it appears that articles of incorporation had actually been drawn up and signed, and officers of the organization elected, and that the officers making the representations did not know that the corporation was illegal and unauthorized.

BURDEN OF PROVING FRAUD AND FRAUDULENT REPRESENTATIONS is upon the party setting them up.

CORPORATION MAY, IN ABSENCE OF PROVISION to the contrary in the charter, by resolution or by-law, appoint any person its agent for the purpose of transferring or disposing of its property or negotiable securities; but no officer of the corporation possesses such power exclusively, unless by virtue of some provision of the charter, or some resolution or by-law of the corporation.

AUTHORITY OF PRESIDENT OF CORPORATION TO DISPOSE OF ITS PROPERTY, or transfer its negotiable securities, may be inferred from evidence that he was in the habit of exercising such power, though neither the charter nor regulations of the corporation expressly confer such power upon him.

UNDER RESOLUTION OF DIRECTORS OF CORPORATION, authorizing the president to pay off the debts of the corporation, in any securities or other property of the corporation, he has power to assign to a third party, for the purposes expressed in the resolution, a note executed by a debtor to the corporation.

PRESIDENT OF CORPORATION MAY, WITHOUT EXPRESS AUTHORITY, perform all acts which are incident to the execution of the trust reposed in him, and which custom or necessity imposes upon the office.

WRIT of error. The opinion states the facts.

Thomas J. Turner, for the appellants.

J. H. Knowlton, for the appellee.

By Court, WALKER, J. This was an action of *assumpsit*, brought by James Mitchell, Roderic Richardson, Holden Putnam, and John Page, in the circuit court of Jo Daviess, against Thomas Deeds. The action was for the recovery of two promissory notes executed by defendant to the Racine and Mississippi Railroad Company, and indorsed to plaintiffs before their maturity. There were several defenses interposed, and on the trial in the court below the jury found for the defendant. To reverse that judgment, the cause is brought to this court on error.

We will first determine whether this company had such an existence as authorized them to take these notes and to assign them. It is insisted that the articles of consolidation executed by the two companies, having no seal attached, was void, and failed to produce the corporate body intended to have been organized by these articles.

An act of the general assembly, approved on the fourteenth day of February, 1857, more than one year after the articles of consolidation were executed, declares that the consolidation is ratified and confirmed. It will not be denied that the general assembly has the same power to confirm and validate an irregularly organized corporate body as it has to bring into existence a new one. It must therefore be held that this company became legal by this act, if not so previous to that time.

It is however said that the notes in controversy, having been executed on the 9th of May, 1856, about nine months before this act was passed, were not affected by its provisions. This is no doubt true, but appellee admitted the existence of the body by giving them. It has been repeatedly held that under a plea of *nul tiel* corporation, when an organization in fact and a user is shown, the existence of the body is proved. In this case the proof shows an organization in fact by the election of officers who acted for the body, and that they used and enjoyed the franchises of a railroad company organized by the laws of the state, and not only so, but appellee fully admitted the existence of such a body by executing to it the notes in question.

The tenth section of our statute regulating negotiable instruments gives the defense of a failure of consideration, in whole or in part, or the want of a consideration, but saves the rights of *bona fide* holders by assignment before they fall due. It has been held, under this section, that when the want or

failure of consideration is pleaded, it must be proved by the party who interposes the defense: *Stacker v. Watson*, 1 Scam. 207; *Topper v. Snow*, 20 Ill. 434. As a general rule, subject it may be to a few exceptions, the party who holds the affirmative of an issue is held to its proof. It then devolved upon appellee to prove the averment that appellants had notice of the defense set up, as they were purchasers of the notes by assignment before they became due. Even had it appeared there was a want of consideration, or that it had failed in whole or in part, still it was indispensable that it should have been proved that appellants had notice of the fact when they received them to have constituted a defense. This issue, like all other affirmative issues, should be proved by a preponderance of evidence.

The notes were indorsed by Durand, the president of the company; and to establish his authority to make the assignment, appellants read in evidence two resolutions of the board of directors of the company. The first was adopted on the 28th of January, 1858, and authorizes the president and vice-president of the company to enter into such arrangements with the creditors of the company and the holders of its securities for such relief as the circumstances and the necessity of the company might require, and to make such stipulations and agreements as they might deem proper and expedient. The other resolution was adopted on the 26th of October, 1859. It authorizes the president to pay off any debts owing by the company, in any securities or other property of the corporation, at such rate as he may deem advisable. This, so far as we can see, was the last action taken by the board in reference to conferring power to dispose of the securities of the company. By this latter resolution Durand had ample power to sell these notes for the purpose of paying any portion of the indebtedness of the corporation, and there is no evidence in this record that they were sold for any other purpose. It was prior in date to the assignment; and the adoption of this resolution, by fair intendment, abrogated so much of the former one as was repugnant to its provisions, and invested the president with the sole power to act, and hence this last delegation of power must control.

A large number of instructions were asked by each party on the trial below. A number of those asked by appellants were refused, and exceptions duly taken at the time. Of that number is the eleventh, which is this:—

"The jury are instructed that though they should believe from the evidence that the instrument for consolidation between the Wisconsin Railroad Company and the Rockton and Freeport Railroad Company had no seal attached, yet that if they also believe from the evidence that said companies were authorized, under the laws of Wisconsin and Illinois, to consolidate; that it was the *bona fide* intention of the companies to consolidate conformably to such authority; that they believed they had so consolidated; that under said instrument of consolidation the said companies did in fact unite in constructing and operating a continuous line of road in said states; that no stockholders ever objected to such consolidation as to such united construction and operation; and that such consolidation has never been judicially declared invalid, or attacked in any proceeding undertaken directly for that purpose,—then it is for the jury to say whether there was fraud, either actual or constructive, in the representations of the railroad company, to the effect that it had the right to construct and operate a railroad in the state of Illinois."

The pleas had set up and relied upon fraudulent representations as a defense to these notes, and in maintenance of the pleas, it was insisted that the original companies were not legally consolidated, and that representations that they had become consolidated was a fraud upon appellee.

To constitute fraud, there must be a willful, false representation of facts, or the suppression of such facts as honesty and good faith require to be disclosed. If, then, the officers attempted, in good faith, to consolidate these roads, and the persons who represented that they had accomplished that object did so, in good faith, an essential ingredient of fraud was wanting, and that defense was not made out under the plea.

Again, a user of franchises raises the presumption, in a collateral proceeding, that a corporation is in the rightful exercise of such power. The averment in the declaration that the body is an incorporation is sustained by proving that they are exercising corporate rights and privileges. But when the government proceeds against such a body by *scire facias* or *quo warranto*, to terminate the existence of a body because it is alleged they have usurped their franchises, then they are bound to show a sufficient grant to authorize their organization, and also that they have conformed to all of the material requirements imposed by their charter, or if not, that their organization has been properly legalized.

The law is well settled in this state that under the plea of *nul tiel* corporation, the plaintiff need only show an organization in fact, and a user of corporate franchises: *Marsh v. Astoria Lodge*, 27 Ill. 421; *President and Trustees of Mendota v. Thompson*, 20 Id. 197; *Town of Lewiston v. Proctor*, 27 Id. 414; *Hamilton v. Town of Carthage*, 24 Id. 22. In this case, there had been an effort to consolidate the two roads. Articles had been drawn up and signed; officers had been elected, and had entered upon the discharge of their duty, and were engaged in the construction of the road,—which was certainly sufficient to repel the presumption of fraudulent representations that the roads had consolidated, unless the officers knew that the consolidation was illegal and unauthorized.

Having given these notes to this company, appellee admitted the existence of the corporate body, and it devolved upon him to prove that no such body existed in fact to avoid the payment of the notes for the want of a party with whom to contract.

There was evidence in this case tending to show user of franchises usual to such bodies, and the question whether the existence of the corporation had been shown was fairly before the jury, and the instruction fairly presented the question whether the officers of the road had knowledge that no consolidation had been effected, and it should have been given.

The court below likewise refused to give appellants' twentieth instruction. It is this:—

“In order that the defendant may avail himself of the defense set up in the second and third pleas in this case, it must not only appear that the statements and representations set forth in said pleas were made, but it must also appear that such statements and representations were false; and that the parties making them knew them to be false at the time they were made.”

The special pleas filed by appellee contain the matter of several separate defenses. Among the averments is one that false and fraudulent representations were made by the officers of the company as to its solvency and progress to completion, and that they were relied upon by appellee as true when he gave these notes. He avers that the company had practiced fraud to induce him to execute the notes, and that he relied upon the false and fraudulent representations thus made, and having made the averments, he must prove them, and failing to do so, he must fail on this issue. Appellee has taken upon

himself the burden of proving the representations to be false, and that the officers making them knew the fact, and that appellants were informed thereof when they took the assignment of the notes. This instruction fairly presents the question whether the statements were made; if so, whether they were false, and the officers acting for the company knew it. The instruction was proper, and should have been given. Fraudulent representations relied upon as a defense must be established like other fraud.

In so far as the appellee's instructions contravene the eleventh and twentieth of appellants' instructions, they were erroneous, and should not have been given without proper modifications. In giving them the court erred.

As to the second instruction asked by appellants, it was calculated to mislead the jury, and was therefore properly refused. As we understand the law, a corporate body may, unless otherwise provided by their charter, appoint any member of the body, or other person, by their by-laws or by resolution, an agent to transfer or dispose of their property or negotiable securities. No officer of the body has that exclusive power, unless given by the charter. They may confer power on the president, treasurer, secretary, other officer, or other person. But in the absence of both statutory authority and regulations of the body on the subject, the presumption might be indulged that the president, as the head of the organization, would have authority, if incident to the organization, or in conformity to the usage and custom of business. The doctrine seems to be settled that the president of a corporate body being its head, and through him the usual affairs of the company are constantly performed, and such acts are incident to the execution of the trust reposed in him, such as custom or necessity has imposed upon the office, he may perform without express authority. And it is immaterial whether such authority exists by virtue of his office, or is imposed by the course of business of the company: *Chicago, Burlington, and Quincy R. R. v. Coleman*, 18 Ill. 297 [68 Am. Dec. 544]. Had there been evidence that the president was in the habit of transferring such instruments, in the regular course of the business of the company, then his authority might be inferred, and the instruction would have been proper.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

LEGAL EXISTENCE OF CORPORATION IS PROVED PRIMA FACIE by proof of the charter, and of organization and exercise of the powers conferred: *Merchants' Bank v. Harrison*, 93 Am. Dec. 285, and note; and see the principal case cited to this effect in *Willard v. Trustees*, 66 Ill. 56. To the point that corporate existence cannot be attacked in collateral proceedings, see the principal case cited in *Cincinnati, L., F., & C. R. R. Co. v. Danville & V. R. R. Co.*, 75 Id. 116. Person contracting with corporation admits its existence: *Holloway v. Memphis etc. R. R. Co.*, 76 Am. Dec. 71, and note.

BURDEN OF PROVING WANT OF CONSIDERATION of negotiable instrument: See *Jennison v. Stafford*, 48 Am. Dec. 594, and note.

BURDEN OF PROOF IN CIVIL ACTIONS IS GENERALLY ON PARTY having affirmative of issue: *Bowser v. Bliss*, 43 Am. Dec. 93; *Swafford v. Whipple*, 54 Id. 498.

FRAUDULENT REPRESENTATIONS INVALIDATING TRANSACTION: See *Converse v. Blumrick*, 90 Am. Dec. 230, and note. In *Tone v. Wilson*, 81 Ill. 534, citing the principal case, it is said that there must be knowledge of the falsity of statements on the part of the one making them to render them fraudulent.

POWER TO SELL AND CONVEY CORPORATE PROPERTY may be conferred by the board of directors upon an agent or officer by its resolution duly adopted: *Gashwiler v. Willis*, 91 Am. Dec. 607, and note.

POWER OF PRESIDENT TO CONTRACT, in the absence of a resolution of the board of directors, may be inferred from his open and notorious exercise of such power: See *Pizley v. Western P. R. R. Co.*, 91 Am. Dec. 623, and note.

GILLHAM v. MADISON COUNTY R. R. Co.

[49 ILLINOIS, 484.]

SERVIENT OWNER HAS NO RIGHT, BY ERECTION OF EMBANKMENTS or by other artificial means, to stop the natural flow of surface water from the dominant heritage, and thus throw it back upon the latter.

ACTION for damages to plaintiff's lands. The opinion states the facts.

Billings and Wise, for the plaintiff in error.

Dale and Burnett, for the defendants in error.

By Court, BREESE, C. J. The question presented by this record is, Has the owner of a servient heritage a right, by embankments or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter?

The case was this: Plaintiff in error was the owner of a tract of land less elevated than the land in the neighborhood, from which all the water that fell upon it from rains or otherwise flowed onto the land of the plaintiff, and which, by

means of a depression in his land, ran off his land to adjoining land, and thence into a natural lake.

The defendant, a railroad company, made a large embankment on the line of plaintiff's land, entirely filling up this channel, thereby throwing the water back on plaintiff's land. Negligence in so doing, without leaving an opening in the embankment for the water to flow on and escape, was alleged in the declaration. A demurrer was sustained to the declaration.

This is a very interesting question, demanding more time for its thorough examination than we have at our disposal.

We have looked into the authorities cited on both sides, and find in Massachusetts the courts of that state recognize the right of the servient heritage to obstruct the natural flow of surface water, according no right of action in behalf of a person injured thereby: *Gannon v. Hargadon*, 10 Allen, 109 [87 Am. Dec. 625]; *Dickson v. Worcester*, 7 Id. 19; *Inhabitants of Franklin v. Fish*, 13 Id. 212; *Parker v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Id. 601. The doctrine of these cases wholly ignores that most favored and valuable maxim of the law, *Sic utero tuo ut alienum non lædas*, a maxim lying at the very foundation of good morals, and so preservative of the peace of society.

In *Kauffman v. Griesemer*, 26 Pa. St. 407 [67 Am. Dec. 437], the doctrine was recognized, that the superior owner might improve his lands by throwing increased waters upon his inferior through the natural and customary channels, and in *Martin v. Riddle*, 26 Id. 415, it was held, where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one, and the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or drains by which the flow of the water is directed from its natural channel, and a new channel made on the lower ground, nor can he collect into one channel waters usually flowing off into his neighbor's field by several channels, and thus increase the wash upon the lower fields. *Miller v. Laubach*, 47 Id. 154 [86 Am. Dec. 521], is to the same effect.

This is the doctrine of the civil law, and has found favor in almost all the common-law courts of this country and of England: *Acton v. Blundell*, 12 Mees. & W. 324; *Mason v. Hill*, 5

Barn. & Adol. 1; *Bellows v. Sackett*, 15 Barb. 96; *Laumier v. Francis*, 23 Mo. 181; *Earl v. De Hart*, 12 N. J. Eq. 280; *Laney v. Jasper*, 39 Ill. 46; *Livingston v. McDonald*, 21 Iowa, 160 [89 Am. Dec. 563]. Other cases might be cited, but we will content ourselves, for the present, with citing some comments of Professor Washburn, in his able treatise on the law of easements and servitudes, on the case of *Martin v. Riddle*, *supra*.

In *Martin v. Riddle*, the plaintiff was the dominant proprietor, as is the plaintiff in error here, and in his comments on the case he says: "The owner of the upper field has a natural easement, as it is called, to have the water that falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude, in the nature of dominant and servient tenements": Washburn on Easements, marg. p. 355. To the same effect is 3 Kent's Com. 563.

The case of *Livingston v. McDonald*, *supra*, was a case of drainage, where it was held, if the ditch increased the quantity of water upon the plaintiff's land, to his injury, or without increasing the quantity threw it upon the plaintiff's land in a different manner from what the same would have naturally flowed upon it, to his injury, the defendant was liable for the damage thus occasioned, even though the ditch was constructed by the defendant in the course of the ordinary use and improvement of his farm.

By the same reasoning, the reverse of the proposition must be true, that a person cannot, by an embankment or other artificial means, obstruct the water in its natural flow, and thus throw it back upon the upper proprietor: *Nevins v. City of Peoria*, 41 Ill. 502 [89 Am. Dec. 392]; *Rudd v. Williams*, 43 Id. 385.

The declaration stated a good cause of action, and the demurrer should have been overruled.

For the error in sustaining it, the judgment is reversed and the cause remanded.

Judgment reversed.

SURFACE WATER, RIGHTS OF OWNER AND ADJACENT PROPRIETOR: See *Gannon v. Hargadon*, 87 Am. Dec. 625, and cases cited in note. The principal case is cited to the point mentioned in the *syllabus*, in *Gormley v. Sanford*, 52 Ill. 158; *Toledo, W. & W. Ry Co. v. Morrison*, 71 Id. 618; *Jacksonville, N. W., & S. E. R. R. Co. v. Cox*, 91 Id. 503; *Shane v. Kansas C., St. J., & C. B. R. R. Co.*, 71 Mo. 245. *Taylor v. Fickus*, 64 Ind. 175, is distinguished from the principal case. The facts in that case were, that the defendant, by setting out a row of trees, obstructed the flow of drift wood and water caused by freshets in the river, which had theretofore been accustomed to flow over his land.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

WOOLERY v. WOOLERY.

[29 INDIANA, 242.]

ADVANCEMENT. — IN ACTION BY CERTAIN HEIRS of a deceased testator against others, claiming that lands conveyed to the latter were intended as an advancement, an instruction that "the purchase of land, and the payment therefor by the father, and the causing the deed to be made to a child, in the absence of all proof of intention, raises a presumption that it was intended as an advancement," is correct.

ADVANCEMENT. — Whether property given to a child by a parent shall be regarded as an advancement is purely a question of the parent's intention; but in the absence of any proof of the intention, the fact that the father voluntarily conveys real estate, or causes it to be conveyed, or transfers personalty to a child, is *prima facie* evidence of an advancement, and not a gift.

ADVANCEMENT — PAROL EVIDENCE TO DISPROVE DECLARATION. — Where a parent, before his death, transfers or conveys property to some of his children, parol evidence is admissible to show that it was not intended as an advancement, but as a gift; and the declarations of the parent, shortly before as well as subsequent to the transfer, are admissible for that purpose.

THE opinion states the case.

S. Turman, for the appellants.

D. E. Williamson and A. Daggy, for the appellees.

By Court, ELLIOTT, J. This was a suit by the appellees against the appellants for partition of two hundred acres of land in Putnam County, of which, in September, 1866, Abraham Woolery, the ancestor, died seised and intestate. The plaintiffs below are four of the children of the intestate. The defendants, who are the appellants here, are Martha Woolery,

the widow, William M. and John J. Woolery, sons, and William O. Hart, the grandson of the decedent.

On the 26th of September, 1864, said Abraham Woolery purchased a tract of land containing eighty acres, situate in Edgar County, Illinois, of the value of two thousand four hundred dollars, paid the purchase-money, and caused the land to be conveyed to his sons William M. and John J. Woolery, which, it is alleged in the complaint, was an advancement to them by their said father, and should be charged against them in the division of his estate. But the sons insist that the land was conveyed to them as a gift from their said father, and not as an advancement. Out of this issue arise the only questions in the case.

The question of advancement was submitted to a jury. On the trial, the plaintiffs gave in evidence a deed from one John Henderson to said William M. and John J. Woolery for the land in Illinois referred to, and also introduced the said William M. Woolery as a witness, who testified that his father paid for the land described in said deed, and gave it to him and his brother, and caused it to be conveyed to them; "that nothing was said by his father as to its being an advancement to them, or as to any intention on his part to charge them with it as an advancement"; that he (said witness) was in his twenty-second year, and resided with his father at the time of said conveyance, having never left the parental home. On this evidence, the plaintiffs rested the question.

One John Adams, a competent witness, was thereupon introduced and sworn as a witness on behalf of the defendants, who thereupon offered to prove by him that he was at the house of said Abraham Woolery, the ancestor, in said county of Putnam, on the 24th of September, 1864, when said Abraham asked the witness to write a will for him, and then told the witness that he wanted to give said William M. and John J. Woolery, his younger sons, more property than the rest of his children; that the witness thereupon advised said Abraham that he could effect his purpose of giving said William and John more property than his other children without a will, by conveying or causing land to be conveyed to them; and that, pursuant to said advice, the said Abraham went to Illinois, and on the 28th of September, 1864, purchased the land described in the deed, and caused it to be conveyed to said William and John. The defendants further offered to prove, by the same witness, that about twenty or thirty days

later, said Abraham informed the witness that he had purchased said land in Illinois, and caused it to be conveyed to said William and John as a gift, for the purpose of securing to them a larger share of his property than the other children would receive; to all of which the plaintiffs objected, and the court sustained the objection, and excluded the evidence, to which the defendants excepted.

The defendants also offered to prove by one Simpson Watson, a competent witness, that after the purchase and conveyance of the Illinois land to said William and John, the said Abraham informed the witness that he had purchased said land and caused it to be conveyed to said William and John as a gift, for the purpose of securing to them a larger share of his property than the other children would receive. This evidence was also objected to by the plaintiffs and excluded by the court, to which the defendants excepted.

An exception was also taken to the following instruction given by the court to the jury: "The purchase of land and the payment therefor by the father, and the causing the deed to be made to a child, in the absence of all proof of intention, raises a presumption that it was intended as an advancement."

The following instructions were prayed by the defendants, and refused by the court, viz.:—

"1. If the deceased conveyed or caused the land in question to be conveyed to William and John, without any valuable consideration having been paid by them, the presumption arising from this simple fact is, that said conveyance was intended as a gift, and not as an advancement.

"2. After showing the conveyance of the land in question to William and John, the burden of proof is upon the plaintiffs, alleging the fact, to prove that such conveyance was intended as an advancement.

"3. If the jury find, from the evidence, that the deceased, in his lifetime, conveyed to the defendants, or to either of them, the Illinois land named in the complaint, without any valuable consideration, the law presumes the same to be a gift, and the jury must find it to be a gift, and not an advancement, unless they also find from the evidence that the same was designed and intended to operate as an advancement."

The jury returned the following verdict: "We, the jury, having referred to us the issue of advancements, find that Abra-

ham Woolery, deceased, the ancestor of said plaintiffs and defendants, advanced said defendants William M. Woolery and John J. Woolery, on the twenty-eighth day of September, A. D. 1864, eighty acres of land in the state of Illinois, of the value of two thousand four hundred dollars, being to each of them twelve hundred dollars, by purchasing said lands and causing the same to be conveyed to them, as alleged in the complaint."

Motion for a new trial overruled, and a decree of partition in accordance with the verdict of the jury. Other proceedings were had, resulting in a final partition of the land in Putnam County, Indiana, charging therein said William and John with twelve hundred dollars each, as advanced to them by the conveyance of the land in Illinois. The case is before us on a bill of exceptions, reserving the questions of law involved under section 347 of the code: 2 G. & H. 210.

There are but two questions presented by the record necessary to be noticed: 1. Are the facts that the father purchased the land in Illinois and paid for it with his own money, and then caused it to be conveyed to his sons, William and John, *prima facie* evidence of an advancement to them? 2. Did the court err in rejecting the parol evidence offered by the appellants?

Section 12 of the statute of descents (1 G. & H. 293) provides that "advancements in real or personal property shall be charged against the child, or descendants of the child, to whom the advancement is made, in the division or distribution of the estate, but if the advancement exceed the equal proportion of the child advanced, the excess shall not be refunded."

It is further declared by section 14 of the same act that "maintaining, educating, or giving money to a child under the age of majority, without any view to a portion or settlement in life, shall not be deemed an advancement."

It will be observed that section 12 does not define what shall be an advancement, while section 14 only declares what shall not be deemed such. In *Dillman v. Cox*, 23 Ind. 440, it is defined to be "a giving by anticipation the whole or part of what it is supposed a child will be entitled to on the death of the parent or party making the advancement." It must have been intended as an advancement to make it such, and not as a mere gift. It is therefore purely a question of intention on the part of the parent or party making the advancement or gift. The intention may be shown by parol proof,

but in the absence of any other evidence, the fact that the father voluntarily conveys real estate, or causes it to be conveyed, or transfers personal property to a child, is *prima facie* evidence of an advancement, and not a gift: 4 Kent's Com. 418. It was so expressly held in *Dillman v. Cox*, *supra*; see also *Stanley v. Brannon*, 6 Blackf. 193, and *Hodgson v. Macy*, 8 Ind. 121. In *Shaw v. Kent*, 11 Id. 80, which arose under the revision of 1843, it was held that "to constitute an advancement to a child 'by settlement or portion of real or personal estate,' such settlement or portion must have been so intended." That the intention may be shown by parol evidence is also clearly recognized in that case. The wording of the statute of 1843 is not the same as that of 1852, but there is no substantial difference between them in principle. We therefore conclude that the court did not err in its instruction to the jury, or in refusing the instructions asked by the appellants.

2. Did the court err in rejecting the parol evidence offered by the appellants? We have already shown that the presumption, arising from the conveyance of the Illinois land to William and John, that it was intended as an advancement to them, might be rebutted by parol evidence; the only question, therefore, remaining to be determined is, Was the evidence offered legitimate for that purpose?

That the father purchased the land in Illinois, paid for it, and caused it to be conveyed to his two sons, William and John, are facts not controverted by them. Nor was the evidence rejected by the court intended either to prove or disprove those facts; it was offered simply to show that the father intended the conveyance as an absolute gift, and not as an advancement. The main fact, the conveyance of the property to the two sons, was established by other evidence. The declarations of the father, made a few days prior to the conveyance, as well as those made subsequent thereto, tending to show his purpose or intent in procuring the conveyance, may be fairly considered as a part of the *res gestæ*, or facts forming a part of the transaction, and in explanation thereof, and were proper evidence for that purpose. The same principle is recognized in the opinion of the court in the case of *Inhabitants of Milford v. Inhabitants of Billingham*, 16 Mass. 108. But the case of *Hicks v. Gildersleeve*, 4 Abb. Pr. 1, is directly in point. There the question was, whether certain entries made by the father in a book of property transferred by him to his

children, and also his oral declarations made in reference to the alleged advancements, and a statement in a paper signed by him, and intended as a will, but which was invalid as such, were properly admitted in evidence to show the intent of the father to charge the several sums to the children as advancements. In the decision of the question, it is said by the court that "the declaration, oral or written, of a parent, his entries and charges in his books, or any explicit memorandum made by him, are unquestionably proper evidence upon questions of advancement after it has been proved that a child has received money or property of such parent, to show that such money or property was neither intended as an absolute gift on the one hand, nor to create a debt on the other. For that purpose I think the declarations of the intestate, his entries in his account-book, and the paper signed by him, and intended for a will, were properly received in evidence in this action. But this is their only effect. They do not prove or establish the fact that any of these children had money or property from their father. That must be shown like any other fact, in a legal manner, and according to the ordinary rules of evidence."

On this point, the appellees' counsel refers to the case of *Tremper v. Barton*, 18 Ohio, 418, as sustaining the ruling of the common pleas. We do not so understand that case. It was a bill for the review of a previous decree in a case in which one Edward Barton, Sen., had purchased a tract of land, and caused it to be conveyed to his son. After the death of the father, his other children filed a bill claiming an interest in the land by descent, on the ground that it was conveyed to the son in trust for the father, which was denied by the son. On the trial, the court received evidence showing that the object in causing the conveyance to be made to the son was to defraud the creditors of the father. This was one of the errors complained of in the bill of review. The court, after deciding that the evidence was properly admitted, and that the fact that the land was conveyed to defraud creditors defeated the plaintiff's claim, also held that the conveyance to the son might be sustained as an advancement, and in that connection said: "If a father thus purchases land, and directs the conveyance to be made to a son or daughter, the presumption is that it is intended as an advancement. This presumption may be rebutted by competent evidence. Declarations made by the father subsequent to the conveyance,

however, would not be sufficient. But even if they were, it seems in this case that the father treated the land as his son's for many years after the date of his deed, and even up to near the time of his death." The subsequent declarations of the father, here referred to, were evidently those in which he claimed the land on the ground that it was held by the son in trust for him. Such declarations would be clearly inadmissible, as they would go to defeat the title of the son; and it is well settled that the declarations of a vendor subsequent to the conveyance are not proper for such a purpose. But in the case at bar, the evidence offered was for a very different purpose, and we think the court erred in rejecting it.

The judgment is reversed, with costs, and the cause remanded for a new trial.

ADVANCEMENTS. — The law relating to this question is very fully discussed in the note to *Miller's Appeal*, 80 Am. Dec. 559. In this case, *Woolery v. Woolery* is cited, and the current of authority shown to be in accordance with its principles. To the same effect are *Jackson v. Jackson*, 64 Id. 114; *Grattan v. Grattan*, 65 Id. 726; *Smith v. Strahan*, 67 Id. 622; *Rockhill v. Spraggs*, 68 Id. 607, and notes.

THE PRINCIPAL CASE IS CITED to the point that "it is certainly proper that all declarations of intent, made by a parent during the execution of a settlement of property among a set of his children, should be admitted in evidence to aid in determining whether such purpose was to make an advancement or gift to each of such children," in *Duling v. Johnson*, 32 Ind. 162; and to the same effect in *Hamlyn v. Nesbit*, 37 Id. 284, 294. In *Harness v. Harness*, 49 Id. 384, the rule of the principal case is modified so as to admit in evidence conversations of deceased only when they occurred before or at the time of the transaction, or so immediately thereafter as to constitute part of the *res gestæ*.

STEVENS v. PARISH.

[29 INDIANA, 260.]

EXECUTORY CONTRACTS OF MARRIED WOMEN. — The common-law rule that the wife, during coverture, is incapable of entering into an executory contract is not changed by statute in Indiana.

AN EXECUTORY CONTRACT BY WIFE ALONE OR JOINTLY WITH HER HUSBAND, for the sale of the wife's lands, is not binding on her, nor is it in the power of the court, or the husband, to compel the wife to join her husband in a deed conveying her lands.

HUSBAND CANNOT BE COMPELLED TO JOIN WIFE IN CONVEYANCE OF HER SEPARATE PROPERTY; the authority given him by statute to do so is purely discretionary, the exercise of which must depend entirely upon his own will.

THE opinion states the facts of the case.

S. Major and E. H. Davis, for the appellant.

B. F. Davis, for the appellee.

By Court, ELLIOTT, J. This was a complaint by Parish, the appellee, against Martin Stevens, the appellant, and Leah Stevens, his wife, to compel the specific performance of a contract for the sale and conveyance of certain real estate owned by the wife.

It is alleged in the complaint, that in January, 1856, said Leah Stevens, then being the wife of said Martin Stevens, was seised in fee in her own right, as one of the children and heirs at law of Edmund K. Parish, deceased, of one undivided seventh of a quarter-section of land, which is particularly described, situate in Shelby County; that said Leah and her husband, Martin Stevens, at the date aforesaid, sold the interest of said Leah in said land to said Parish for the sum of \$225, which he then and there paid to them, in consideration of which said Leah and Martin agreed to execute and deliver to said Parish "a good and sufficient deed of conveyance, with covenants of warranty," for the interest of said Leah in said land; that in pursuance of said agreement, on the same day, all of said parties went before the recorder of Shelby County for the purpose of having said deed executed; that they were advised at the office of the recorder that it was both unnecessary and improper that said Martin Stevens should join with his wife Leah in the execution of said deed, and thereupon, relying upon the advice so given them, and all of them believing that a deed executed by said Leah alone was all that was necessary to convey her interest in said land, she did thereupon execute and deliver to said Parish a deed of conveyance therefor, accordingly, without her said husband joining therein, but with his knowledge and consent; that said Parish was thereupon put into possession of the interest so conveyed, which he had ever since held and enjoyed, and had made lasting and valuable improvements thereon, of the value of one thousand dollars; that said plaintiff was ignorant of the fact that his title was invalid because said Martin Stevens had not joined with his said wife in the execution of the deed, until about a month before the commencement of the suit, in October, 1865, and that immediately after he was informed of the fact he procured a deed to be prepared, ready for execution by said Martin and

Leah Stevens, for the interest of said Leah in said land, and caused the same to be presented to said Martin Stevens for execution, but he refused to execute the same, or to join with his wife in the execution thereof, although she was ready and willing to join with him therein.

Prayer, that the defendants be required to execute and deliver to the plaintiff a proper conveyance for the interest of said Leah in the land, or, in default thereof, that a commissioner be appointed by the court to execute such conveyance, and for general relief.

A demurrer was filed to the complaint by the defendant Martin Stevens, which was overruled, and he then answered by a general denial, and by a second paragraph, setting up the statute of frauds. The latter was rejected by the court on the plaintiff's motion. Leah was defaulted. The issue on the denial of Martin Stevens was tried by the court, and found for the plaintiff, and a motion for a new trial having been overruled, a decree was rendered against the defendants, vesting all the right and title of said Leah to the land in said Parish, in fee-simple, and a commissioner was appointed to execute and deliver to him a deed therefor, which, being done, was examined and approved by the court.

The reasons assigned for a new trial are, — 1. That the finding of the court is contrary to law; 2. That the finding of the court is contrary to the evidence.

The record contains the evidence, which in the main sustains the allegations of the complaint. The only points of difference are these: The evidence shows that the contract was in fact made with Leah Stevens, but Martin, her husband, was informed of and assented to it. He was present when she executed the deed, and was willing to join her in its execution, if it had been deemed necessary. The purchase-money was not paid at the time the deed was executed, but notes were given for it, which were afterwards paid to Martin Stevens.

These variances do not change the question presented by the complaint, and the case may be disposed of by a decision of the question raised by a demurrer to the complaint, the overruling of which is one of the errors assigned.

The question is, Do the facts alleged in the complaint show a valid cause of action? It is declared by the fifth section of the "act touching the marriage relation," etc., 1 G. & H. 374, that "no lands of any married woman shall be liable for

the debts of her husband, but such lands, and the profits therefrom, shall be her separate property, as fully as if she was unmarried; provided, that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join." And section 6 provides that "the separate deed of the husband shall convey no interest in the wife's land."

At common law, the husband, by the marriage, became entitled to an estate in possession in the lands of the wife during their joint lives, which was subject to sale on execution for his debts, or might be sold and conveyed by him: *Montgomery v. Tate*, 12 Ind. 615. This rule, however, did not apply to lands conveyed to the separate use of the wife, known as her separate estate.

The statute cited above changes the common-law rule, and, in effect, converts the lands held by a married woman in general property into her separate estate, with only a limited power of alienation: *Cox v. Wood*, 20 Ind. 54. It divests the husband of any legal interest in his wife's lands during coverture. He cannot encumber it, or convey any interest in it, nor is it in any manner subject to his debts.

The well-known rule of the common law, that the wife, during coverture, is incapable of entering into an executory contract, is not changed in this respect by the statute. She can encumber or convey her lands only "by deed in which her husband shall join," and then she is not bound by any covenant therein: 1 G. & H., sec. 6, p. 258.

An executory contract by the wife, or by the husband and wife, for the sale of her land, is not binding on her; nor is it in the power of the husband or the court to compel the wife to join her husband in a deed conveying her lands. If she voluntarily joins with her husband in a conveyance thereof by deed, her title is thereby divested. She is bound by such an executed conveyance thereof, but by no other mode of contract. And so the husband, though he has no separate power to sell or convey the lands of the wife, is authorized by the statute to join with her in a deed of conveyance therefor; but this is purely a discretionary power, the exercise of which must depend entirely upon his own will. And we are not aware of any principle of law authorizing the court to compel the husband or the wife to join in such a conveyance. We therefore conclude that the facts alleged in the complaint do not justify

a decree for specific performance, and that the circuit court erred in overruling the demurrer to the complaint.

The judgment is reversed, with costs, and the proceedings subsequent to the demurrer to the complaint set aside, with directions to the circuit court to sustain the demurrer.

MARRIED WOMAN, AS GENERAL RULE, can make no contract; and exceptions to this rule must be created by positive law: *Stephenson v. Osborne*, 90 Am. Dec. 358; *Burdens v. Amperse*, 90 Id. 225. She is not liable in damages upon covenants in deed of her land, nor is she liable where she joins in a covenant in a deed of her husband's land: *Childs v. McCheesney*, 89 Id. 545. See, as to contracts of married women, *Baker v. Gregory*, 65 Id. 366; *Dobbin v. Hubbard*, 65 Id. 425, and notes.

WIFE'S SEPARATE ESTATE, whether legal or equitable, in the absence of statute, cannot be conveyed except by the joint deed of herself and husband: *Morrison v. Wilson*, 73 Am. Dec. 593.

THE PRINCIPAL CASE IS CITED to the point that the deed of a married woman, not joined in by her husband, is absolutely void, not only as a conveyance, but as a contract or agreement to convey, in *Shumaker v. Johnson*, 35 Ind. 35; *Scranton v. Stewart*, 52 Id. 90; *Hamar v. Medaker*, 60 Id. 415; that a married woman could make no contract for the conveyance of her real estate, by which she would be bound, nor could she convey the same except by an instrument in which her husband should join, that she could bind herself in no way by an executory contract for the sale of her lands, nor could she by conduct estop herself from asserting her title, *Parks v. Barrowman*, 83 Id. 562; *Miller v. Albertson*, 73 Id. 345; *Saman v. Springate*, 67 Id. 121; *Bowers v. Van Winkle*, 41 Id. 434; *Light v. Lane*, 41 Id. 542; *Hodson v. Davis*, 43 Id. 264.

INDIANAPOLIS AND CINCINNATI R. R. Co. v. Cox.

[29 INDIANA, 300.]

COMMON CARRIER.—LIMITATION OF LIABILITY BY NOTICE STAMPED ON BAGGAGE-CHECK.—Where a passenger upon a railroad train delivered his baggage to the company to be transported to his destination, and received a baggage-check in return, upon which was stamped a notice that in consideration of free carriage the company's liability in case of loss of the baggage was limited to one hundred dollars, if the baggage is lost, this notice does not exempt the company from liability above that amount, as this result could only be attained by a special contract, which this notice does not amount to.

COMMON CARRIER CANNOT BY NOTICE LIMIT HIS LIABILITY for a loss resulting from his want of care.

COMPENSATION FOR CARRIAGE OF BAGGAGE IS INCLUDED IN PASSENGER'S FARE.

THE opinion states the case.

W. Cumbach, S. A. Bonner, and J. D. Miller, for the appellant.

G. D. Hinckle and K. M. Hord, for the appellee.

By Court, RAY, J. This cause was submitted to the court below upon the following agreed statement of facts: The appellee purchased a ticket issued by appellant as evidence of a right of passage from Indianapolis to Shelbyville, and his baggage was taken charge of by said company for delivery at that point, a check being given for the same, upon which was stamped on one side thereof these words: "In consideration of free carriage, its value is agreed to be limited to one hundred dollars," and on the reverse, "I. & C. R. R., 583, Indianapolis and Shelbyville." The appellee could have read the words and figures on the check. The value of the baggage was \$167.50, and it was lost by the appellant. Judgment was rendered by the court for the full value.

It was held in *Orange County Bank v. Brown*, 9 Wend. 85 [24 Am. Dec. 129], that "a common carrier who carries passengers and their baggage is responsible for the baggage if lost, although no distinct price be paid for its transportation. The compensation for its conveyance in contemplation of law is included in the fare of the passenger." The law, as thus stated, was recognized in *Camden etc. Transportation Co. v. Belknap*, 21 Wend. 353. In *Jordan v. Fall River R. R. Co.*, 5 Cush. 69 [51 Am. Dec. 44], this language is used: "It was held in the time of Lord Holt, and formerly by the supreme court of New York, that passenger-carriers were not liable for baggage unless a particular and distinct price had been paid for its conveyance. But it is now well settled, and is a matter of great and general convenience and accommodation in this age of universal and perpetual traveling, that passenger-carriers are responsible for the baggage of a passenger, and that the reward for conveying the baggage is included in the passenger's fare."

The ruling in the cases of *Cole v. Goodwin*, 19 Wend. 251 [32 Am. Dec. 470], and *Gould v. Hill*, 2 Hill, 623, was, that "common carriers cannot limit their liability or evade the consequences of a breach of their legal duties as such, by an express agreement or special acceptance of the goods to be transported."

Many of the earlier and most carefully considered cases in England have treated notices given by common carriers, limit-

ing their common-law liability, as having no application to a loss of goods resulting from the ordinary risks of transportation, but as intended to relieve the carrier from the extraordinary hazards imposed upon him. Thus, as a carrier of passengers, the liability for injury only results where there has been a want of proper care, diligence, or skill. But in relation to baggage, carriers are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or the public enemies. It would seem more reasonable, if any effect whatever be given to such notices, that they should only protect the carrier in case of a loss against which his care and skill could not guard, rather than that they should be held to relieve him from the results of his own neglect. Such, indeed, was the effect given to a stipulation that the carrier "was not to be responsible in any event for loss or damage": *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344. To the same effect are the cases of *Slocum v. Fairfield*, 7 Hill, 292; *Whitesides v. Russell*, 8 Watts & S. 44; *Baker v. Brinson*, 9 Rich. (L. R.) 201 [67 Am. Dec. 548]; *Berry v. Cooper*, 28 Ga. 543. This distinction was also taken in *Parsons v. Monteath*, 13 Barb. 353, and the rule as announced in *Gould v. Hill*, *supra*, was there modified.

Without deciding that the carrier may thus limit his liability, we hold that the limitation cannot, in any case, apply to a loss resulting from his own want of care. As the law imposes the general liability upon him, he could only avail himself of an exemption from such responsibility by proof that the loss occurred from some cause within the exception: *Davidson v. Graham*, *supra*, and the cases we have cited following. In *Moore v. Evans*, 14 Barb. 524, it was held that the *onus* was upon the owner of the goods to prove want of care in the carrier; but the ruling is certainly against authority, and is, we think, an unreasonable departure from the rule at common law, by which the carrier was required to show affirmatively that the loss resulted from inevitable accident or the public enemy. In this case, the evidence did not bring the appellant within any such exception.

But there is another ground upon which the judgment below must be affirmed. If such a limitation of the liability imposed by law can be secured to the carrier, it can only be by express contract. In the case of *Kerr v. Willan*, 2 Stark. 53, where the party delivering the goods could read and had seen the carrier's notice of the conditions on which he received the

goods hanging in the office, but not supposing it interested him, had not read it, Lord Ellenborough said at the trial: "You cannot make this notice to this non-supposing person." We may well conclude that a passenger receiving a metal check for his baggage, marked with its destination and the number, would be "non-supposing" of a release of the carrier's liability stamped upon the other side. In *Malone v. Boston and Worcester R. R. Co.*, 12 Gray, 388 [74 Am. Dec. 598], the passenger received a check containing the letters, in large type, "B. & W. R. R. Check. Boston to Worcester." And in the left-hand lower corner, in quite small type, the words "Look on the back." On the reverse, in equally small type, was the following: "Passengers are not allowed to carry more than eighty pounds of baggage, all of which must be strictly personal, and not exceeding fifty dollars in value, unless notice is given and an extra price paid"; and also certain rules in regard to smoking and standing upon the platform, and this additional notice: "For other regulations, see printed notice in the cars and at the stations." It was also proved that in each of defendant's cars was posted a placard containing a like notice of limitation of liability, and notice as to smoking in the cars, standing on the platform, etc., and that the defendant had read the notice in the cars as to smoking and standing on the platform. He denied, however, having read the notice as to the limitation of liability. It was held that his acceptance of such a check did not discharge the carrier, without proof of express notice at the time of receiving the check, leaving undecided, as had been done in *Brown v. Eastern R. R. Co.*, 11 Cush. 97, the question of the power of a common carrier to discharge himself by contract from common-law liability. In the latter case the restriction of liability was printed in small type on the back of the ticket, and the court held that taking the ticket raised no legal presumption that the plaintiff read the printed matter; that it was a question of fact whether she knew the contents before she started on her journey, and that if not read until she had started, her rights were not affected by it. In *Gouger v. Jolly*, 1 Holt, 317, it is said: "The carrier is responsible unless express notice is brought home to the plaintiff." So Best, C. J., in *Brooke v. Pickwick*, 4 Bing. 218, held a notice posted in the carrier's office insufficient, but that actual notice of the limitation of liability should be given. So are all the cases: *Davis v. Willan*, 2 Stark. 279; *Butler v. Heane*, 2 Camp. 415; *Walker v. Jackson*, 10 Mees. & W. 161;

Beckman v. Shouse, 5 Rawle, 179 [28 Am. Dec. 653]; *Michigan Central R. R. Co. v. Hale*, 6 Mich. 243. We do not think the method adopted in this case raised any presumption of a contract limiting the liability of the appellant.

The judgment is affirmed, with five per cent damages and costs.

COMMON CARRIER CANNOT LIMIT HIS COMMON-LAW LIABILITY BY ANY NOTICE, given either by publication, or by entry on receipts given or tickets sold: *Southern Express Co. v. Purcell*, 92 Am. Dec. 53. The carrier can only limit his liability by express contract, or by notice brought home to the owner of the goods before or at the time of delivery to him, if such notice is assented to expressly or impliedly by the owner: *Id.*; *Fillebrown v. Grand Trunk R'y Co.*, 92 Id. 606. Common carrier cannot limit his legal liability by notice, or by entry on receipt or ticket: *Southern Express Co. v. Newby*, 91 Id. 783. Unless the assent of an owner is shown to a notice limiting a carrier's liability, the notice is of no effect: *Blumenthal v. Brainard*, 91 Id. 350. Common carrier may limit his responsibility by a general notice that the baggage of a passenger is at the risk of the owner, provided the terms of the notice are clear and explicit, and are brought home to the employer: *Pennsylvania R. R. Co. v. Schwarzenberger*, 84 Id. 490. In the note to these cases, this question will be found elaborated upon.

COMPENSATION FOR CARRIAGE OF BAGGAGE is included in the fare of the passenger: *Warner v. Burlington etc. R. R. Co.*, 92 Am. Dec. 389. Carriers of passengers with their ordinary baggage are liable for any losses occurring from any accident to the baggage while it is in their keeping as carriers, except those arising from the act of God or the public enemy: *Roth v. Hannibal etc. R. R. Co.*, 90 Id. 738.

BAINBRIDGE v. SHERLOCK.

[29 INDIANA, 364.]

OHIO RIVER IS GREAT NAVIGABLE HIGHWAY BETWEEN STATES, AND PUBLIC HAVE ALL RIGHTS that by law appertain to public rivers, as against the riparian owners; but there is no "shore" in the legal sense of that term, — that is, a margin between high and low tide, — the title to which is common. The rights of the public are only upon the water; the banks belong to the riparian owner, and he owns an absolute fee down to low-water mark.

RIGHT TO USE OHIO RIVER AS HIGHWAY FOR PASSAGE IS DISTINCT FROM RIGHT TO LAND for the purpose of receiving and discharging freight and passengers. The former is secured to the public; the latter must be exercised with reference to the rights of the riparian owner.

RIGHT TO LAND UPON BANKS OF OHIO RIVER. — Right of navigator to land along the banks of such streams as the Ohio River is confined to such points as have been set apart for or used as public landings, except in case of some peril or emergency of navigation, or in cases of danger or necessity, when a landing may be made upon the bank at any place without the consent of the riparian owner.

RIGHT TO BUILD AND MAINTAIN WHARF OUT TO POINT IN STREAM where it is practicably navigable, or even beyond that point, provided it does not obstruct navigation, is a well-established incident to riparian ownership.

WHARF-BOAT OF RIPARIAN OWNER MOORED TO HIS BANK IS ENTITLED TO SAME IMMUNITIES from trespass or obstruction by vessels navigating the river as the land itself.

RIGHT TO USE REASONABLE WATER SPACE IN FRONT OF WHARF FOR PURPOSE of mooring vessels landing thereat is an incident to its ownership. This space, when not actually occupied by boats, may be freely traversed by the public engaged in navigating the stream, but it cannot be used as against the wharf proprietor, and without his consent, as mooring-ground for vessels.

NAVIGATOR WHO LAWFULLY LANDS AT REGULAR WHARF IS NOT JUSTIFIED BY ANY PUBLIC RIGHT in the river or stream in so mooring his boat that its side and stern will be carried against or lie along the wharf of an adjoining wharf-owner.

THE opinion states the case.

J. Sullivan, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for the appellant.

C. E. Walker, for the appellee.

By Court, GREGORY, C. J. There are errors and cross-errors assigned, but all the questions involved turn upon the nature and extent of the rights of the riparian owners along the Ohio River.

The appellant owns real estate in the city of Madison, bordering on the river. The river front of this property extends from the west line of West Street two squares down the river. This river front is graded from the top of the bank to the water line, and is known as wharf property. For many years the appellant has kept upon this property a wharf-boat, subservient to the uses of river navigation and commerce. For the use of it he receives, from steamers and other water craft navigating the river, from three dollars to twenty-five dollars for each landing, depending on the length of time a boat remains at the wharf, and the amount of business done. Two other public wharfs are maintained at Madison, viz., the Roe Wharf, extending from the eastern line of West Street up the river 168 feet to the west line of an alley, and the City Wharf, extending from the east line of that alley up the river 168 feet to Mulberry Street. West Street is sixty feet wide; it is the principal thoroughfare leading from the steamboat landing up into the city. The appellant keeps his wharf-boat below West Street, upon and near the upper end of his wharf

property. This location is convenient to the mouth of West Street. The water is not as good for landing above as at the plaintiff's wharf. The wharf-boat at the Roe Wharf is kept at the lower end of that wharf property, upon or immediately above the east line of West Street. By placing the Roe wharf-boat at that place, it also is near the mouth of West Street, and is also in better water for the approach of steamers.

The appellees, the Cincinnati and Louisville Mail Line Company, have for many years owned and run a daily line of steamers each way, and during a great portion of the time they have run a double daily line of boats each way. For several years past all these boats have landed at the Roe Wharf, making usually four landings each day. Sometimes a boat thus landed would remain two hours, but ordinarily from a quarter to half an hour. The results of this arrangement, so far as concerned the plaintiff, were, that very frequently his wharf-boat was struck and broken, and thrown out of water by defendants' steamers, thus causing direct pecuniary damage; and that constantly, at least twice, and usually four times a day, the large boats of the defendants rested upon plaintiff's wharf, lapping over and covering up from one third to one half of his wharf-boat. While his wharf-boat was thus occupied by defendants' steamers, no other boat could land at it without first pushing them out into the river, occupying from five to ten minutes each time. Another result of this arrangement was, and necessarily would be, that transient steamers approaching the plaintiff's wharf, but finding it thus obstructed, would, whenever there was sufficient water, pass up outside, and land at an unobstructed rival wharf above.

The evidence given, and that offered by the appellant and ruled out by the court below, tended strongly to show that the plaintiff was damaged by this mode of landing. Is this in legal sense an injury, or is it *damnum absque injuria*? The solution of this question is the turning point of the case.

The inquiry that meets us at the threshold is, What are the rights of the navigator of this river to the use of its banks and margins? The Ohio River is a great navigable highway between states, and the public have all the rights that by law appertain to public rivers as against the riparian owner. But there is no "shore," in the legal sense of that term; that is, a margin between high and low tide,—the title to which is common. The banks belong to the riparian owner, and he owns

an absolute fee down to low-water mark: *Stinson v. Butler*, 4 Blackf. 285.

In *Ball v. Herbert*, 3 Term Rep. 253, the question considered was, whether there existed a common-law right to use the banks of the river Ouze for towing boats. That was a navigable river, and in the state of navigation then existing the right thus to use the banks was essential. But all the judges concurred in holding that no such right existed at common law.

In *Blundell v. Catterall*, 5 Barn. & Ald. 268, 7 Eng. Com. L. 152, determined in the king's bench, the question was, whether or not the public had a common-law right of bathing in the sea, and, as incident thereto, of crossing the shore for that purpose. This led to a very general consideration of the subject of public and riparian rights, the result of which was a denial of the right claimed.

Justice Holroyd, after recognizing the public right of passage over the sea and over navigable rivers, says: "These rights are noticed by Lord Hale; but whatever further rights, if any, they have in the sea or in navigable rivers, it is a very different question whether they have, or how far they have, independently of necessity or usage, public rights upon the shore (that is to say, between high and low water mark), when it is not sea or covered with water, and especially when it has from time immemorial been, or has since become, private property. For the purpose of the king's subjects getting upon the sea, and upon the navigable rivers, to exercise their unquestionable rights of commerce, intercourse, and fishing, there are not only the ports of the kingdom, established from time to time by the king's prerogative, and called by Lord Hale the *Ostia Regni*; but also public places for embarking and landing themselves and their goods. It was not by common law, nor is it by statute, lawful to come with, or land, or ship customable goods in creeks or havens, or other places out of the ports, unless in cases of danger or necessity; nor fish or land other goods not customable, where the shore or the land adjoining is private property, unless upon the person's own soil or with the leave of the owner thereof, who, Lord Hale says, may, in such case, take amends for the trespass in unloading upon his ground, though he may not take it as a certain common toll. The public common-law rights, too, with respect to the sea, etc., independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea and on the sea-shore, when covered with water; and though, as incident

thereto, the public must have the means of getting to and upon the waters for these purposes, yet it will appear that it is by and from such places only as necessity or usage has appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the sea-shore, or the land adjoining thereto, except in case of peril or necessity. As to the owner's right to improve the shore, it is laid down that the king cannot grant a right to lade or unlade on the *ripa*, or bank, without the owner's consent. There cannot, therefore, be any common-law right to lade or unlade on the quay or shore, or land adjacent in the port. Lord Hale notices and establishes the public right of navigating and fishing upon and in the water, and the right of resort to the ports, and of lading and unlading, landing and embarking therein, either at the public places appointed, or by usage established for those purposes, or, with consent, upon the land either of the king or of individuals, but no further."

Justice Bayley, referring to a passage from Bracton, in his opinion, says: "The word '*ripa*' here applies to rivers and ports, and probably also to the land above the high-water mark; and if it does, is this the law of England? Have all persons the right to fasten a ship to the banks of a river? or have they a right to tie ropes to the trees, or to land goods on the bank of every navigable river? The case of *Ball v. Herbert*, 3 Term Rep. 262, is not a distinct authority upon this point, inasmuch as in that case the right of towing was claimed. But the general question as to the right of the public on the *ripa* of a navigable river was discussed, and the court appear to have been of opinion that the *ripa* of a navigable river was not *publici juris*, and they therefore virtually overruled the authority of Bracton."

Mr. Washburn, in his work on easements, states the law on this subject thus: "In regard to the right to land upon other points upon the banks of a navigable stream than those which have in some way become public landings, the law would seem to confine it to cases of necessity, where, in the proper exercise of the right of passage upon the stream of water, it became unavoidable that one should make use of the bank for landing upon, or fastening his craft to, in the prosecution of his passage": Washburn on Easements and Servitudes, sec. 9, p. 403.

The supreme court of the United States, in *Dutton v. Strong*, 1 Black, 23, recognized the right of a riparian owner to erect,

for private use, a pier extending into a lake, which served the purpose both of a landing-place for freight, and for its stowage.

The Ohio River is a great highway between states under national sanction; yet we suppose that it would not be in conflict with the authority of the general government for this state, within her territorial limits, to provide for and regulate by law public landing-places along its shore for the benefit of trade and commerce, and for this purpose, to exercise the right of eminent domain.

The right to the use of the river as a highway for passage is distinct from the right to land for the purpose of receiving and discharging freight and passengers. The former is secured to the public; the latter must be exercised with reference to the rights of the riparian owner.

The river being public, and its banks being private, it is not difficult to discover the true foundation of those riparian rights, known as wharf rights. It is essential to the successful prosecution of his business that the navigator shall make frequent landings to lade and unlade, to receive and discharge passengers, and to receive supplies. But except in case of some peril or emergency of navigation, he cannot thus land without the consent of the riparian owner, and in return for the privilege of landing, a reasonable compensation may be demanded. This is the origin of wharfage.

In *Blundell v. Catterall*, *supra*, Best, J., who dissented from the opinion of the court denying the common-law right of bathing in the sea, in the course of his opinion says: "The owner of the soil of the shore may also erect such buildings, or other things as are necessary for the carrying on of commerce and navigation on any parts of the shore that may be conveniently used for such erections, taking care to impede as little as possible the public right of way. This is not more inconsistent with a public right of way over it than the right of digging a mine under a road, or the erecting of a wharf on a river, are inconsistent with the right of way along such road or river. The former does not interfere with the use of the road; and although the latter, in order to be useful, must be carried out beyond the high-water mark, and while the tide is up, must somewhat narrow the passage of the river; yet such wharfs are necessary for the loading and unloading of vessels, and the right of passage must be accommodated to the right of loading and unloading the craft that pass."

Chief Justice Abbott, in the course of his opinion in the same case, says: "By what law can any wharf or quay be made? These, in order to be useful, must be below the high-water mark, that vessels or boats may float to them when the tide is in. And it is to be observed that wharves, quays, and embankments, and intakes from the sea, are matters of public as well as of private benefit."

In the case of *Dutton v. Strong*, 1 Black, 23, above cited, the court say: "Wharfs, quays, piers, and landing-places for the loading and unloading of vessels were constructed in the navigable waters of the Atlantic states by riparian proprietors at a very early period in colonial times; and in point of fact, the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time."

These wharves, if they would subserve the only purpose for which they exist, must approach at least to the edge of that portion of the river that is practically navigable. The right to place and maintain them even beyond this point, provided they do not unnecessarily obstruct navigation, is a well-established incident to riparian title. The wharf-boat is entitled to the same immunity from trespass or obstruction by vessels navigating the river as the land itself.

If a navigator lands without authority on a barren bank, he is technically a trespasser for trampling over the pebbles. But incident to the ownership of that barren bank is a vested right of great possible value,—the right to hire it for the incidental use of navigation whenever and wherever a developed river commerce may bring it into demand. The wharf-boat represents this right or privilege in its condition of beneficial development. It would be but an idle benefit to the proprietor if the law protected him only against technical trespass upon the naked bank, but refused to protect him in the customary exercise and enjoyment of the only right that makes his title to the bank especially valuable. If the navigator cannot lay his boat *in invitum* against the soil, or obstruct the proprietor's access to the river, still less should he be allowed thus to use the wharf-boat. The very right that in the first case would be but technically violated would in the second case be actually and substantially invaded. It is impossible to conceive of a wharf right without an incidental right of access. In *Irwin v. Dixon*, 9 How. 33, the court say:

"From the very nature of wharf property, likewise, the access must be kept open for convenience of the owner and his customers." So, also, it is impossible to conceive of a wharf right without an incidental right to use a reasonable water space in front of it for the purpose of mooring vessels landing at the wharf. Of course that water space, when not actually occupied by boats, may be freely traversed by vessels navigating the river under the general public right; but it cannot be used as against the wharf proprietor, and without his consent, as mooring-ground for vessels. One cannot properly be said to own a wharf for any particular class of vessels, unless he has in front of and contiguous to his own soil sufficient mooring-ground for that class of vessels. This right to an appropriate space for mooring-ground is in principle precisely the same thing as the easement known as dock-room or dockage, appurtenant to the more elaborate and expensive wharf structures found in commercial seaports, and this right or easement has been repeatedly recognized by judicial determination.

Washburn on Easements and Servitudes, 400, has this passage: "So a party obstructed in the use of a stream as a highway may himself remove it, as was held where one fastened a raft of logs to the bank in such a manner as to prevent another from landing at his own wharf in a boat."

Rice v. Ruddiman, 10 Mich. 125, was a case involving the consideration of riparian rights. Judge Manning, in his opinion in the case, says: "Wharfs and piers are almost as necessary to navigation as vessels and ship-yards, or the places for the construction of vessels are indispensable. . . . It seems to me, on principle as well as reason, that the owner of the shore has a right to use the adjacent bed of the lake for such purposes."

Martin, C. J., in his opinion in that case, says: "They [riparian owners] have the right to construct wharves, buildings, and other improvements in front of their lands, so long as the public servitude is not thereby impaired. They are a part of the realty to which they are attached, and pass with it. Certainly no one can occupy, for his individual purposes, the water in front of such riparian proprietor, and the attempt of any person to do so would be a trespass."

The theory on which the case at bar was tried in the court below was substantially this: that in the exercise of their rights as navigators, the defendants might land upon and obstruct the plaintiff's wharf as much as they pleased, provided

they did it carefully and skillfully, and that, no matter to what extent the plaintiff was actually damaged, he could not be deemed to be legally injured. The court erred in the instructions given and in those refused.

The defendants are presumed to know the natural result of their own acts. They had daily experience to show them that a landing at the Roe Wharf would result in injury to the plaintiff. As navigators of the Ohio River, they had no right to land on the wharf of the plaintiff, unless by his consent. The defendants were trespassers for each act of injury to the plaintiff caused by landing their boats. The court should have so instructed the jury. The evidence offered by the plaintiff, tending to show the extent of this injury, ought to have been admitted. It was not competent for the plaintiff to prove the amount of damage by the opinion of experts, but this must be determined by the jury from all the facts; the value of the right, the disturbance of that right, the value of the right subject to the injury caused by the unlawful acts of the defendants, are matters proper to go to the jury. The court below erred in overruling the appellant's motion for a new trial.

In our view of the case, it is unnecessary to pass upon the effect of the special findings of the jury on the general finding. Substantial justice requires a new trial.

It is assigned, as cross-error, that the court erred in overruling the demurrers to the several paragraphs of the complaint. The objection taken to each paragraph is the lack of an averment that the plaintiff himself was guilty of no negligence.

The first paragraph of the complaint avers that defendants, "without leave, wrongfully entered" upon the lands described, owned by plaintiff, and continuously used, took possession of, and broke the wharf-boat of the plaintiff, on, attached to, and connected with the land.

The second paragraph avers that plaintiff was the owner, etc., of a certain wharf-boat, attached and annexed to the same lands, and that defendants, on the 1st of June, 1867, and daily and continuously thereafter, ran their steamers upon and against the plaintiff's wharf-boat, thereby damaging it.

The fourth paragraph avers the ownership of the land and the wharf-boat, and a prescriptive right to keep a wharf appurtenant to the land. The defendants, with their boats, un-

necessarily and continuously struck against and damaged the wharf-boat, and obstructed the passage to and from it; and that they unnecessarily, and without cause, occupied the river in front of the wharf, interrupting and preventing ingress and egress.

The complaint is good, and the court below committed no error in overruling the demurrer. This case does not belong to that class of cases in which it is necessary to aver that the plaintiff was without fault. A custom existing at other places could have nothing to do with the rights of the appellant.

The judgment is reversed, with costs, and the cause remanded, with directions to grant a new trial, and for further proceedings.

RIGHTS OF PUBLIC OVER STREAMS POSSESSING VALUABLE CAPACITY FOR FLOTAGE: See *Lancey v. Clifford*, 92 Am. Dec. 561; *Gerrish v. Brown*, 81 Id. 569; *Davis v. Winslow*, 81 Id. 573; *Rhodes v. Otis*, 73 Id. 439. Rivers and streams above ebb and flow of tide, and which are of sufficient capacity for useful navigation, are public, and are subject to the same general rights which the public exercise in highways by land; but the riparian proprietors own the banks and bed, and have a right to make such use of the land and of all the benefits of the stream as will not interfere with the public easement or servitude: *Lorman v. Benson*, 77 Id. 435. In Pennsylvania, such streams as are navigable in fact are in a legal sense navigable streams: *Monongahela Bridge Co. v. Kirk*, 84 Id. 527. The Ohio River is in effect a navigable stream, as it is a public highway for direct navigation of boats: *Baker v. Lewis*, 75 Id. 598; *Porter v. Allen*, 65 Id. 750.

RIGHT TO LAND ON BANK OF NAVIGABLE STREAM, AND WHARF RIGHTS. — Right to raft logs down stream does not involve right to boom them upon private property for safe-keeping: *Lorman v. Benson*, 77 Am. Dec. 435. Raftsmen on navigable streams have no right so to moor their rafts that they will deprive wharf-owners of access to their wharves; and the owner of such a wharf, in order to reach it with his vessel, would not in untying such an obstructing wharf, doing no unnecessary damage, be liable for loss of lumber occasioned thereby. Riparian owners are entitled to free access to their wharfs, and it is incompetent for a raftsman to endeavor to establish a custom to obstruct the same: *Harrington v. Edwards*, 84 Id. 768. The rights to moor boats and other crafts at well-known landings and wharves on a stream is as well secured and protected by law as that of actual navigation: *Baker v. Lewis*, 75 Id. 598. The right to erect a wharf is founded either in the ownership of the soil or the right of eminent domain. A wharf when built by an individual is private property: *Jeffersonville v. Louisville Ferry Co.*, 89 Id. 495. Riparian proprietor on navigable water has no right at common law to wharf out against his own land, and in case of perpesture, the right of entry is not in the adjacent land-owner, but in the crown; thus the owner of a lot on the water front of San Francisco has no right without license to wharf out from his own land into the bay: *Dana v. Jackson St. Wharf Co.*, 89 Id. 164. See the notes to all these cases.

THE PRINCIPAL CASE IS CITED to the point that the title of the riparian owner on the Ohio River extends to low-water mark, subject only to the

easement in the public of the right of navigation, in *Martin v. City of Evansville*, 32 Ind. 86. The riparian owner has the exclusive use of the banks to low-water mark, and a navigator cannot land against the will of the riparian owner: *Ensminger v. People*, 47 Ill. 384. The principal case came again before the court, and the views therein expressed were considerably modified: *Sherlock v. Bainbridge*, 41 Ind. 35.

INDIANAPOLIS, CINCINNATI, AND LAFAYETTE RAILROAD COMPANY v. JONES.

[29 INDIANA, 465.]

CONSOLIDATION OF TWO CORPORATIONS INTO ONE NEW ONE ends their separate existence, and vests all their effects and franchises in the new company; and for the purpose of answering for the liabilities of the two companies, the new one shall be deemed to be merely the same as each of its constituents; their existence continued in it under the new form and name, their liabilities still existing as before, and capable of enforcement against the new company the same as if no change had occurred in its organization or name.

PLEADING. — In action against a consolidated corporation for a liability of one of the companies of which it was formed, the pleadings should aver the facts showing the consolidation in order to avoid a variance.

THE opinion states the case.

W. Cumback, S. A. Bonner, and J. D. Miller, for the appellant.

J. Gavin, for the appellee.

By Court, FRAZER, J. This case is here solely upon a question of the sufficiency of the evidence. It was a suit to recover the value of a steer, alleged to have been killed by defendant's cars, in April, 1865, in Decatur County, the railroad not being fenced. The answer was the general denial. The issue was found for the plaintiff, and his damages assessed at one hundred dollars. The question made is without any substantial merit, being purely technical. It must, however, be determined according to law. It was the cars of the Indianapolis and Cincinnati Railroad Company that killed the steer, since which time that company's road has been consolidated with the road of the Lafayette and Indianapolis Railroad Company, under the laws of this state, and the corporation thus formed is the appellant, the Indianapolis, Cincinnati, and Lafayette Railroad Company.

It is disputed that the consolidated company, the appellant, is liable for the value of the steer; and *Evansville v. Evansville Gaslight Co.*, 26 Ind. 447, is relied on as an authority to sus-

tain the proposition. The case seems to us to have no bearing whatever upon the question.

By the consolidation, both of the old companies ceased to exist separately, and all their effects and franchises were vested in the new company. The two corporations became merged in one. We cannot imagine how the Indianapolis and Cincinnati Railroad Company could afterwards be sued. Upon whom would process be served? It ceased to have any officers or agents. It ceased to be a separate legal entity. Instead of two, there was now but one corporation, made up of the mingled elements of the two pre-existing companies, so combined and merged that neither could be separately identified or brought into court. But what are the rights of creditors and persons upon whom torts have been committed by the vanished corporations? A dead man may have an administrator to represent his estate, and answer to suits, but a corporation lawfully disappearing thus has no estate to be administered. Its assets have lawfully vested in the new consolidated corporation. Must lawful claims be lost, then? That result cannot follow. The legislature has chosen to make no provision upon the subject, and the industry of counsel, as well as our own-examination of the books, has failed to discover any direct authority upon the question before us. The analogies of the law, too, afford little aid in its solution. We regret to be compelled to decide it without a more thorough argument. Giving it, however, the best consideration of which we are capable under the circumstances, we have reached the conclusion that, for the purposes of answering for the liabilities of the constituent corporations, the consolidated company should be deemed to be merely the same as each of its constituents, their existence continued in it, under the new form and name, their liabilities still existing as before, and capable of enforcement against the new company in the same way as if no change had occurred in its organization or name. This doctrine seems to spring from the necessities of justice, and so far as we are able to foresee, cannot result in wrong or embarrassment. To avoid variance in proof, the complaint should, in this case, have averred the facts, which it did not; but it seems to us that it could have been cured by amendment on the trial, and that the variance is therefore not available to the appellant here.

The judgment is affirmed, with ten per cent damages, and costs.

CONSOLIDATION OF CORPORATIONS—EFFECT OF: See a full discussion of this question in note to *McMahan v. Morrison*, 79 Am. Dec. 420; see also *State v. Bailey*, 79 Id. 405.

THE PRINCIPAL CASE IS CITED and followed upon the question of the liability of a consolidated company for the debts and torts of the constituent companies, in *Columbus etc. R. R. Co. v. Powell*, 40 Ind. 41; *Jeffersonville etc. R. R. Co. v. Hendricks*, 41 Id. 60.

JEFFERSONVILLE RAILROAD Co. v. COTTON.

[29 INDIANA, 498.]

WHERE EMPLOYEE OF COMMON CARRIER UPON BEING ASKED if plaintiff's goods had arrived replied that they had not, when in truth they had, the company will be liable for the direct consequences of this false answer.

WHERE COMMON CARRIER TRANSPORTED GOODS TO THEIR DESTINATION, and after keeping them a few days deposited them in a warehouse, and the owner called a few days later and inquired if the goods had arrived, and was informed by an employee of the carriers that they had not, and a few days later the goods were burned, the carrier is liable for their loss, if it was the direct result of the false answer, and the jury having found that it was, their finding will not be disturbed.

THE opinion states the case.

T. A. Hendricks, O. B. Hord, A. W. Hendricks, and C. L. Holstein, for the appellant.

J. S. Harvey, for the appellee.

By Court, FRAZER, J. The goods of the plaintiff, Anna M. Cotton (appellee), were delivered to the appellant at Jeffersonville, to be shipped to her husband, F. M. Cotton, at Indianapolis. The appellant carried the goods safely to Indianapolis, where they arrived on the same day, July 28, 1866, and were kept in the appellant's station free of charge until August 4th, when they were deposited by the railroad company in the warehouse of responsible and careful warehousemen at Indianapolis. The goods remained there until September 18th, when, without negligence, they were destroyed by fire. Seven days before the fire, the plaintiff, with her husband, called at the defendant's office and asked for the goods, and was informed by a person in charge that they had not arrived. The warehouseman, on receipt of the goods, uniformly notified the consignee by mail, though no one remembered mailing this particular notice. The plaintiff first learned of the shipment of the goods in September, from a sister in Jeffersonville, and never received notice from any one in Indianapolis. The plaintiff had judgment for the full value of the goods, and the case is here on the evidence.

The appellant was in fault only in giving false information as to the arrival of the goods, in consequence of which the jury have inferred that the plaintiff could not find the goods, and that they were destroyed by fire, whereas, if the truth had been communicated, she would have obtained the property and saved it from destruction. The appellant should suffer whatever losses to its customers result directly from such conduct of its employee as this evidence discloses. It was easy enough to have told her the truth; the instincts of a gentleman ought, alone, to have been enough to induce this, but the case shows that it is not always so, and therefore that the responsibility of the railroad company for resultant damages is the only adequate security which the public sometimes have against the supercilious self-consequence of subordinate employees. This tends to secure clerks and agents who will deal truthfully and courteously with those who transact business with them. It is the last case in which the rule *respondeat superior* should be relaxed. It was the duty, and not merely a favor, of the carrier to give such information as would enable the owner of the goods to find the warehouseman with whom they were stored. The falsehood communicated, instead of the truth, would possibly have prevented a discovery of the goods if no fire had occurred; or, at any rate, it prevented the plaintiff from getting possession of them, and thus saving them from the subsequent conflagration. The falsehood, therefore, while it did not cause the fire, did nevertheless, perhaps, produce the loss. So the jury may have considered, and we do not feel at liberty to set aside their conclusion. It is not so plainly unreasonable as to justify our interference.

The judgment is affirmed, with costs.

COMMON CARRIER IS RESPONSIBLE for injury to goods by act of God, if he departs from his line of duty, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury: *Michaels v. New York Central R. R. Co.*, 86 Am. Dec. 415. Actual delivery or completion of transit and notice to the consignee are necessary to terminate the liability of the carrier: *Baldwin v. American Express Co.*, 74 Am. Dec. 190; *Knowles v. Atlantic & St. L. R. R. Co.*, 61 Id. 234, and notes.

THE PRINCIPAL CASE IS CITED AND FOLLOWED in *Mcyer v. Chicago etc. R. R. Co.*, 24 Wis. 566, where it was decided where a station agent entered goods, plainly marked, in a wrong name, whereby the consignees were informed when they called for the goods that there was nothing for them, and the goods were afterwards destroyed by fire, that the carrier was liable for the loss.

FORD v. STATE.

[29 INDIANA, 541.]

WITNESS IS NOT BOUND TO GIVE TESTIMONY which may tend to show himself guilty of crime, nor to disclose a single link in the chain of evidence which would convict him.

WITNESS FOR DEFENSE, IN PROSECUTION FOR BASTARDY, CANNOT BE COMPELLED TO TESTIFY whether he has ever had sexual intercourse with the prosecutrix, if he objects that the answer might tend to criminate him; nor can he be compelled to answer other questions tending to show that his claim of privilege was not well founded.

WHERE WITNESS HAS REFUSED TO ANSWER QUESTION UPON GROUND that his answer would tend to criminate himself, defendant may show, by other and independent evidence, that his answer would not or could not have that effect; and the witness will then be compelled to testify.

THE opinion states the case.

D. Studabaker, B. F. Gregory, and J. Harper, for the appellant.

J. R. Bobo, for the appellee.

By Court, FRAZER, J. This was a prosecution for bastardy. The prosecutrix denied, under oath, sexual connection with any man other than the defendant, and especially with one Isaac Nelson, at a time when the child might have been begotten. The defendant then produced Nelson and interrogated him as to the matter. He declined to answer unless compelled. The court instructed the witness that there were criminal offenses, to establish which against him his having carnal knowledge of the prosecutrix might constitute part of the evidence, and that he was not compelled to answer the question if his answer would be such as would tend to criminate himself, but that in such case he could answer or not, as he pleased. The witness thereupon declined to answer, upon the ground that the answer would tend to criminate himself. The court sustained him in this refusal, and the defendant excepted. The defendant then proposed to ask the witness if he had ever been married, or had dwelt in the same house with the prosecutrix, and proposed to prove by him that the witness was not in such a situation that his answer to the first question could possibly expose him to conviction on any criminal charge. The court, however, refused the proof, and refused to permit the defendant to offer any such evidence, and the defendant excepted.

It is a familiar rule that a witness is not bound to give tes-

timony which may tend to show himself guilty of crime. He is not bound to disclose a single link in the chain of evidence which would convict him. In *Hill v. State*, 4 Ind. 112, it was held that a witness in a bastardy case was bound to answer as to the fact of having sexual connection with the prosecutrix. But it is obvious from the opinion in that case that it escaped the notice of the court that there are crimes under the laws of this state to make out which sexual connection is an important fact. We mention rape, 2 G. & H. 440, seduction, 2 Id. 441, and open adultery, 2 Id. 464.

But suppose the defendant had been permitted to show by the prosecutrix that she had never been the victim of a rape, and that she had never dwelt in the same house with Nelson, and that he had never promised her marriage. Then there could have been no pretense that the principal fact sought to be proved by Nelson would tend to criminate him. But we understand from the bill of exceptions that the court below did not stop with the ruling that Nelson could not be interrogated as to these matters. That point was correctly decided. But the court went further, and "refused to let the defendant offer any evidence in that direction." That refusal presents the only question before us which is not perfectly plain. It seems to be a new question. It has been held that if the witness is protected from conviction by the statute of limitations, he is bound to answer: *People v. Mather*, 4 Wend. 255 [21 Am. Dec. 122]; *Roberts v. Allatt*, 1 Moody & M. 192; 1 Greenl. Ev., sec. 451. It has, on the other hand, been held that the witness is not bound to disclose the circumstances which induce his belief that the answer to the principal question will implicate him criminally, for the very good reason that to do so would be to render his privilege worthless. But can the party calling him show by other testimony that such are the circumstances that the answer will not criminate the witness? That is the question now in hand. If he cannot, it is very apparent that justice may often suffer, and a party be at the mercy of his witnesses, who may claim their privilege without reason, either corruptly or ignorantly, thus depriving him of his evidence. Are the courts to suffer this, when the party calling the witness is able and ready to show that the circumstances are such that it is impossible that the answer of the witness can criminally implicate him? If such circumstances had been in evidence, the court would have seen that the ground upon which the witness claimed his privilege was a

mere pretense to avoid testifying, and must in that case have compelled him to answer: 2 Phill. Ev. 933. Why should such facts not be shown after the witness claims the right to be silent? There is no reason occurring to us, save that of convenience; that it would tend to protract the trial and multiply costs by entering upon the investigation of a collateral matter. But it is rare, if ever, that such an objection can be allowed to stand in the way, when it would prevent the proof of such facts as constitute legitimate and important evidence upon the issue to be tried. Such an objection, in such a case, would be an impediment to the correct administration of justice, and ought to weigh but little. Where the testimony sought can be obtained without invading the privilege of the witness to be silent, it is the right of the suitor that an answer shall be enforced. But of course care should be taken that this right of the witness be not denied. Where he stands upon it, it should appear clearly that the right does not exist in the given case, before he is required to testify. He, as well as the party calling him, must be protected.

The sufficiency of the evidence to support the verdict is seriously and earnestly questioned. On paper, the evidence seems to us somewhat weak. But the jury chose to believe the prosecutrix, and to disbelieve everybody who contradicted her. This they had no right to do arbitrarily and without reason; but we cannot say that they did.

The judgment is reversed, with costs, and the cause remanded for a new trial.

WITNESS IS NOT BOUND TO TESTIFY TO FACTS WHICH WILL HAVE TENDENCY TO CRIMINATE HIMSELF: *Chamberlain v. Wilson*, 36 Am. Dec. 356; *Commonwealth v. Shaw*, 50 Id. 813; *State v. Foster*, 55 Id. 191; *Foster v. Pierce*, 59 Id. 152; *Commonwealth v. Price*, 71 Id. 663, and notes.

EARL v. DRESSER.

[80 INDIANA, 11.]

MEMORANDUM ATTACHED TO BILL OF EXCEPTIONS, SIGNED BY ADVERSE PARTY, admitting that the bill is correct, and agreeing that it may be signed by the judge as of the date of its filing, is not a waiver of the objection that it was not presented to the judge within the time limited by the court. The presumption is, that it was so signed; but where that date is after the time limited, the bill is not properly in the record.

LETTERS OF GUARDIANSHIP ARE, BY COMMON LAW, LOCAL to the jurisdiction in which they are granted; and a foreign guardian cannot, by virtue

of his letters granted by the proper court in another state, where he and his ward are domiciled, claim as a legal right to recover money belonging to the ward in the hands of a guardian of the estate of such ward resident in the state of Indiana. But the court of common pleas in the latter state, possessing general chancery jurisdiction in such cases, and having jurisdiction over the resident guardian, and the funds in his hands belonging to the ward, has power to order that such funds be transmitted or paid over to the guardian in such other state where the ward is domiciled.

PROVISION AUTHORIZING COURT HAVING JURISDICTION TO ORDER DELIVERY OF PROPERTY TO NON-RESIDENT GUARDIANS of non-resident wards as to the court may seem just and right, contained in the Indiana act of 1843, was but declaratory of the law before its enactment, courts of equity having possessed the same power under the common law. The question whether or not such an order should be made is addressed to the sound discretion of the court, to be determined upon principles of comity, equity, and justice; and where it appears for the best interest of the ward, and that no principle of public policy will be violated, or the rights of any of our citizens be injured or impaired, the court should make the order.

FATHER IS NATURAL GUARDIAN, and unless morally or otherwise incapacitated, has the right to the custody, care, and education of his infant child.

APPEAL. The opinion states the case.

Z. Baird and J. D. Gongar, for the appellant.

J. M. Larue and J. M. Dresser, for the appellee.

By Court, **ELLIOTT, J.** Henry H. Dresser, as guardian of his infant son, Earl H. Dresser, appointed by the probate court of the county of Hillsdale, in the state of Michigan, filed a petition in the court of common pleas of Tippecanoe County, in this state, alleging that Henry Earl had been appointed guardian of the estate of said ward by the last-named court, and as such, had received from the estate of the grandfather of said ward five thousand dollars in money belonging to the latter, and praying that said Earl might be compelled to account for the money in his hands, and required to pay the same over to the petitioner, as the guardian of the person and estate of said ward in the state of Michigan, where he and the ward both reside.

A demurrer was filed to the petition, for the want of sufficient facts, which the court overruled, and on the final hearing found that there remained in the hands of said Earl, as such guardian, belonging to said ward, after paying the costs and expenses of his guardianship and the costs of this suit, the sum of \$2,419.75, "and that it would be to the interest of said

ward to transfer said fund to the control and custody of his guardian in the state of Michigan." An order was thereupon rendered, directing Earl to pay into court the balance so found remaining in his hands, and that the clerk thereupon pay the same over to "said Henry H. Dresser, the guardian of said minor in the state of Michigan." From this order Earl appeals to this court.

Errors are assigned upon the action of the court in overruling the demurrer to the petition, and also in overruling a motion for a new trial. The questions discussed, arising upon the motion for a new trial, were attempted to be saved by a bill of exceptions, which, however, was not filed within the time limited by the court, and therefore is not properly in the record. At the close of the proceedings, on the 16th of July, 1867, the court by special leave gave the appellant twenty days in which to prepare and present his bill of exceptions. The bill was filed on the 15th of August, 1867. At its close is the following memorandum:—

"The foregoing bill of exceptions we have examined and find correct, and may be signed by the judge as of date of filing.

[Signed]

"J. M. DRESSER,

"J. M. LARUE,

"Att'ys for Pl'ff."

It is not claimed by the appellant that the bill of exceptions was presented to the judge within the twenty days limited by the court, but it is contended that the memorandum copied above is a waiver of the time, and therefore, that it is properly in the record. We do not so construe the memorandum. If it was intended to waive the question as to the time of filing, and agree that the bill should be considered as a part of the record, that intention might have been clearly expressed in a few words; but the memorandum seems to have been carefully worded to avoid such a conclusion. It acknowledges that the bill is correct, and agrees that it "may be signed by the judge as of the date of filing." The presumption is, that it was so signed, but the date is after the time limited by the court, and we do not think the language of the agreement can be fairly construed into a waiver of the question of time.

The only question then, presented by the record, is that arising upon the demurrer to the petition. It is objected to the petition that it treats the right of the appellee to recover

the fund as one *stricti juris*, and inherent in him as foreign guardian, where the ward is domiciled, independent of the interest of the ward. Without deciding that the objection, if true, would necessarily render the petition bad on demurrer, it is sufficient to say that we do not regard it as asserting such an absolute right. It is not a complaint in the usual form against Earl as a defendant, nor does it demand judgment against him as in an ordinary adversary suit on a money demand. It is in form a petition addressed to the court, representing that the petitioner is the father and duly appointed guardian of the ward, who is an infant under the age of fourteen years, being one of the heirs at law of Mary A. Dresser, deceased, who was a wife of the petitioner, and one of the legatees of the will of James Earl, deceased, late of Tippecanoe County, Indiana; that the ward resides with his said father, in the county of Hillsdale, in the state of Michigan; that on the 24th of January, 1867, the petitioner was duly appointed guardian of the person and estate of the ward by the probate court of said county of Hillsdale, in Michigan; that he executed a bond in the sum of nine thousand five hundred dollars, with sureties to the acceptance and approval of that court, and took upon himself the duties and responsibilities of said guardianship. A copy of his letters and bond are made a part of the petition. The condition of the bond contains this clause: "This bond is given to secure property due said minor in Tippecanoe County, Indiana." The petition further represents that the ward was not the owner of any other personal estate than his interest in the legacy due his deceased mother by the will of James Earl, deceased; that Henry Earl had been appointed guardian of the estate of said ward by the court of common pleas of Tippecanoe County, Indiana, and as such had received a large sum, to wit, five thousand dollars, belonging to said ward on account of the legacy from James Earl to his mother. It alleges a demand of Earl, and a refusal by him to account, and prays that he may be required to render an account of the funds in his hands belonging to the ward, "and that he be ordered to pay the same over to the petitioner as such guardian."

If the court of common pleas had jurisdiction, and possessed the power to make the order requiring the money to be paid over to the guardian appointed in the state of Michigan, where the ward is domiciled, then the demurrer was correctly over-

ruled, and the order of the court is valid. That, by the common law, letters of guardianship are local to the jurisdiction in which they are granted, must be conceded. Speaking on this subject, Justice Story, in his Conflict of Laws, says: "There is no question whatsoever that, according to the doctrine of common law, the rights of foreign guardians are not admitted over immovable property situate in other countries. Those rights are deemed to be strictly territorial; and are not recognized as having any influence upon such property in other countries whose systems of jurisprudence embrace different regulations, and require different duties and arrangements. . . . The same rule is applied by the common law to movable property, and has been fully recognized both in England and America. No foreign guardian can, *virtute officii*, exercise any rights, or powers, or functions over movable property situate in a foreign state. Few decisions upon the point are to be found in the English or American authorities, probably because the principle has always been taken to be unquestionable, founded upon the close analogy of the case of foreign executors and administrators."

It follows that Dresser cannot, by virtue of his letters of guardianship, granted by the proper court in the state of Michigan, where both he and the ward are domiciled, claim to recover the money in the hands of the resident guardian here, as a legal right, because the letters granted in Michigan confer no such extraterritorial power.

But the question is, Had the court of common pleas, possessing as it does general chancery jurisdiction in such cases, and having jurisdiction over the resident guardian and the funds in his hands belonging to the ward, the power to order the funds transmitted or paid over to the guardian in Michigan, where the ward is domiciled?

The revised statutes of 1843 contained a provision authorizing the court having jurisdiction to make such order respecting the delivery and payment of property and moneys to the non-resident guardians of non-resident wards as to the court may seem just and right: Code of 1843, p. 612, sec. 107. No such provision, however, is found in the revision of 1852, or in any subsequent act; but it is claimed by the appellee's counsel that the provision in the code of 1843 is continued in force by section 802 of the code of 1852. We need not determine that question, as we are clear in the opinion that the same power is possessed by courts of equity under the common law, and

the statute of 1843, in that respect, was but declaratory of what the law was before its enactment.

The rule on the subject must necessarily be the same as that relating to executors and administrators of foreign countries, as it is, in both cases, a question of comity. In *Harvey v. Richards*, 1 Mason, 380, where the law on the subject is elaborately discussed, Justice Story says: "A court of equity has jurisdiction to decree an account and distribution, according to the *lex domicilii* of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here. But whether it will proceed to decree such account and distribution, or direct such assets to be remitted, to be distributed by a foreign tribunal, depends upon the circumstances of the case": See also note to section 504 a, of Story's *Conflict of Laws*, ed. by Redfield.

The question here is one involving the doctrine of national comity, growing out of the conflict of independent jurisdictions. It is a question addressed to the sound judicial discretion of the court, to be determined upon principles of comity, equity, and justice. If it appeared, from the facts of the case, that any principle of public policy would be violated, or that the legal rights of any of our own citizens would be injured or impaired by the transmission of the fund to the foreign guardian, it would undoubtedly be right to retain it here. But it does not appear that any such consequences would result from its transmission. Dresser, the foreign guardian, is the father of the ward. The domicile of the father is the legal domicile of the ward, his infant child; and they are both domiciled in the state of Michigan.

The father is the natural guardian, and, independent of his letters of guardianship,—if not morally or otherwise incapacitated,—has the right to the custody, care, and education of his infant child, and would be quite as likely to consult its interests in the disposition or investment of the fund as a stranger, or one more remotely related. Dresser was appointed guardian of the person and estate of the ward by the proper probate court of the county of his domicile, in Michigan, and gave bond, as appears, with special reference to this fund. The bond was approved by the court where it was given, its penalty is ample, and we must presume that the court here, in granting the order, was satisfied of the sufficiency of the sureties.

Under such circumstances, it seems evident that the best

interests of the ward, as well as the principles of justice and fair comity, demand that the fund should be paid over to the foreign guardian. The power of the courts of this state to make such orders is clearly recognized in *Warren v. Hofer*, 13 Ind. 167.

We think the court did not err, either in overruling the demurrer to the petition or in granting the order. The judgment must, therefore, be affirmed.

The judgment is affirmed, with costs.

GUARDIANS OF NON-RESIDENT MINORS, AND PROCEEDINGS TO TRANSMIT PROPERTY TO FOREIGN GUARDIANS. — The authority and the rights and powers of a guardian are strictly local, being circumscribed by the jurisdiction of the government that confers upon him his office. His letters of guardianship have no extraterritorial effect, and cannot operate to give him power to control the property of his ward in another state or country: *Grimmett v. Witherington*, 16 Ark. 377; S. C., 63 Am. Dec. 66; *Kraft v. Wickey*, 4 Gill & J. 332; S. C., 23 Am. Dec. 569; *Woodworth v. Spring*, 4 Allen, 321; *Grist v. Forehand*, 36 Miss. 69; *Leonard v. Putnam*, 51 N. H. 247; S. C., 12 Am. Rep. 106; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Williams v. Storrs*, 6 Id. 353; S. C., 10 Am. Dec. 340; *Matter of Neally*, 26 How. Pr. 40; *Trimble v. Drieduszyki*, 57 Id. 208; *Estate of Biolley*, 1 Tuck. 422; *Ex parte Dawson*, 3 Bradf. 130; *McLoskey v. Reid*, 4 Id. 334; *Matter of Hoeford*, 2 Redf. 168; *Weller v. Suggett*, 3 Id. 249; *West v. Gunther*, 3 Dem. 386; *Estate of Rice*, 13 Phila. 385; *Estate of Goldsmith*, 13 Id. 389; Story on Conflict of Laws, secs. 499, 504 a; Wharton on Conflict of Laws, secs. 459-466; *Hoyt v. Sprague*, 103 U. S. 613; *Johnstone v. Beattie*, 10 Clark & F. 42. One of the rules of comity recognized by some of the states of continental Europe is to acknowledge the authority and power of a foreign guardian over the person and movable property of his ward. But this rule does not prevail in England or in the United States. Story says: "No foreign guardian can, *virtute officii*, exercise any rights or powers or functions over the movable property of his ward, which is situated in a different state or country from that in which he has obtained his letters of guardianship": Story on Conflict of Laws, sec. 504 a. It is universally held that a foreign guardian has no power over the real property of his ward situated in a state different from that in which he has been appointed. In the case of *Townsend v. Kendall*, 4 Minn. 412, S. C., 77 Am. Dec. 534, it was, however, decided that the foreign appointment of a guardian will be recognized in Minnesota as creating that relation between the parties in that state, subject, however, to the state laws as to any exercise of power by virtue of such relation, either as to the person or property of the ward. But the great weight of authority holds that a foreign guardian has no standing in court by virtue of his foreign appointment. It is by comity only that anything is conceded to the guardian of the domicile, although it is usual, by comity, to appoint, if due application is made for that purpose, the same person guardian who was appointed by the domiciliary court: *Hoyt v. Sprague*, 103 U. S. 613; *Weller v. Suggett*, 3 Redf. 249; *Woodworth v. Spring*, 4 Allen, 321.

The extent to which a foreign guardian may be recognized, and the conditions upon which such recognition depends, are regulated by statute in all or nearly all the states of the Union. By the statute of Georgia a non-

resident guardian may sue in the courts of that state: *Sims v. Remick*, 25 Ga. 58. But he cannot so sue after both he and his ward have become residents of Georgia: *Lunday v. Thomas*, 26 Id. 537. A foreign guardian may sue in the courts of Mississippi upon his filing in the court of probate of the proper county a certified copy of his letters and of his official bond, and upon entering into a bond in Mississippi to account to the court from which he received his appointment for all moneys he may receive in Mississippi: *Crist v. Forehand*, 35 Miss. 69. A guardian who resides in another state with his ward, and has been regularly appointed in that state, may file his bill in Tennessee for the sale of real estate of his ward in that state. But he can only receive the funds arising from the sale upon the execution by him in the court having control of him and his ward, a bond under the direction of that court for the proper management and application of such funds: *McClelland v. McClelland*, 7 Baxt. 210; *Hickman v. Dudley*, 2 Lea, 375. A foreign guardian has no standing in the courts of Pennsylvania, unless it is made to appear by certificate that he has given security in the state of his appointment in double the value of the property, and that the law of that state extends the same privileges to citizens of Pennsylvania: *Estate of Rice*, 13 Phila. 385; *Estate of Goldsmith*, 13 Id. 389. In Minnesota, a foreign guardian, upon filing in the court of probate of the county in which his ward's real estate is situated an authenticated copy of the foreign appointment, is at once admitted to the same rights and powers over the real estate of his ward situated within the county that are possessed by a guardian appointed in Minnesota: *Townsend v. Kendall*, 4 Minn. 412; S. C., 77 Am. Dec. 534. In New York, a foreign guardian, in order to be fully recognized as the legal representative of his ward, and to obtain control of his property, must be appointed guardian in that state in the manner provided by section 2838 of the code of civil procedure, which is as follows: "Where an infant, who resides without the state and within the United States, is entitled to property within the state, or to maintain an action in any court thereof, a general guardian of his property, who has been appointed by a court of competent jurisdiction, within the state or territory where the ward resides, and has there given security in at least twice the value of the personal property and of the rents and profits of the real property of the ward, may present to the surrogate's court having jurisdiction a written petition duly verified, setting forth the facts and praying for ancillary letters of guardianship accordingly. The petition must be accompanied with exemplified copies of the records and other papers showing that he has been so appointed, and has given the security required in this section, which must be authenticated in the mode prescribed in article 7 of title 3 of this chapter, for the authentication of records and papers upon an application for ancillary letters testamentary or ancillary letters of administration": *West v. Gunther*, 3 Dem. 386; *Estate of Biolley*, 1 Tuck. 422; *Matter of Hosford*, 2 Redf. 168; *Weller v. Suggett*, 3 Id. 249.

In Illinois, a foreign curator may cite a resident guardian to account without having first obtained leave of the court: *McCleary v. Menke*, 109 Ill. 294. But in Maryland, a foreign guardian cannot, as such, sue in the courts of that state: *Kraft v. Wickey*, 4 Gill & J. 332; S. C., 23 Am. Dec. 569. The same rule is recognized in New Hampshire: *Leonard v. Putnam*, 51 N. H. 247; S. C., 12 Am. Rep. 106. An action cannot be maintained in the courts of Vermont upon a bond executed to a judge of probate in New Hampshire to secure the proper discharge of the duties of guardian, the duties imposed by the guardian's appointment, the obligation created by the bond, and the rights and remedies under it, being all prescribed by the statute of New Hampshire:

Judge of Probate v. Hubbard, 44 Vt. 587; S. C., 8 Am. Rep. 396. Where a ward in Kentucky left the state without the consent of his guardian, and went to Texas, where he chose another guardian, it was held by the Kentucky court that the guardian appointed in Texas could not sue the guardian in Kentucky for the rents of the ward's lands in Kentucky. The ward, being a minor, could not change his residence without his guardian's consent, and the court in Texas had no jurisdiction to appoint a guardian for him: *Munday v. Baldwin*, 79 Ky. 121. In *Succession of Stephens*, 19 La. Ann. 499, where minors removed to another state after the death of their tutor in Louisiana, and guardians were appointed for them in the state to which they had removed, it was held that such appointment would not be recognized by the probate courts of Louisiana having jurisdiction of their property. But it was held that such guardians must qualify as tutors to the minors according to the laws of Louisiana before they could sue for or obtain possession of the property of the minors. Where a non-resident minor has estate in a state, a guardian may be appointed for its administration and investment in that state: *Maxwell v. Campbell*, 45 Ind. 360; *Kraft v. Wickey*, 4 Gill & J. 332; S. C., 23 Am. Dec. 569; *Woodworth v. Spring*, 4 Allen, 321; *Davis v. Hudson*, 29 Minn. 27; *Farrington v. Wilson*, 29 Wis. 383; *Hoyt v. Sprague*, 103 U. S. 613. If a general guardian be appointed in such a case, his appointment will be good to the extent of the minor's estate within the jurisdiction in which it is made: *Davis v. Hudson*, 29 Minn. 27. In Georgia, it is held that a court has no jurisdiction to appoint a guardian of the person of a non-resident minor: *Grier v. McLendon*, 7 Ga. 362; *Boyd v. Glass*, 34 Id. 353. But the California statute provides that if the ward shall come to reside in the state, the guardian appointed while he was a non-resident shall become guardian as to his person also: Cal. Code Civ. Proc., sec. 1794. Where an infant residing in another state has property in Maryland, and has guardians appointed in both jurisdictions, the foreign guardian has the custody of the person, and the domestic guardian has control of his property, and neither can interfere with the other: *Kraft v. Wickey*, 4 Gill & J. 332; S. C., 23 Am. Dec. 569. The fact that a guardian has been appointed for a minor in Massachusetts will not prevent the courts of that state from awarding the custody of the minor to a foreign guardian residing in another state: *Woodworth v. Spring*, 4 Allen, 321.

PROCEEDINGS TO TRANSMIT PROPERTY TO FOREIGN GUARDIAN.—Even without any express statutory provision on the subject, it has been held that a court of chancery has power to make an order or decree requiring the guardian of a non-resident ward to pay over to the foreign guardian the assets of the ward's estate, when in its judgment and in the exercise of a sound discretion it deems such action for the best interest of the ward: *Marts v. Brown*, 56 Ind. 386, citing the principal case; *Leonard v. Putnam*, 51 N. H. 247; S. C., 12 Am. Rep. 106. In doing this, however, it is the duty of the court to exact a bond for the safety of the fund, unless it is satisfied that the general guardian in the foreign state and his sureties would be responsible therefor in such other state: *Andrews's Heirs*, 3 Humph. 592. In South Carolina, before the court will order such removal, it must be satisfied as to the existence of three things: 1. That the guardian has been regularly appointed according to the laws of the state in which the ward resides; 2. The fitness of the guardian for such appointment; 3. That sufficient security has been given by the guardian: *Ex parte Copeland*, Rice Eq. 69; *Ex parte Smith*, 1 Hill Ch. 140; *Ex parte Heard*, 2 Id. 54; *Cochran v. Fillana*, 20 S. C. 237. In most of the states it is expressly provided by statute that

the property of a non-resident ward may be transmitted to the domiciliary guardian upon compliance with certain requirements. In Alabama, it is provided that when a guardian and ward are both non-residents of that state, and the ward is entitled to property there, which may be removed to another state without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state of the residence of the ward, upon the application of the guardian to the judge of probate of the county in which the estate of the ward may be. He must produce an authenticated transcript of the record of a court of competent jurisdiction showing his appointment, where he and the ward reside, his qualification, and that he has given security, and he must give notice to the resident executor, administrator, or guardian, if there be one; and thereupon, if good cause be not shown to the contrary, and the judge of probate is satisfied upon proof made that it will be for the interest of the minor, he must make an order granting such guardian leave to remove the property of the ward, and this is authority to sue for and recover the same: Ala. Code, secs. 2797, 2798. Proceedings for the removal should be instituted in the name of the non-resident guardian, and not in the name of the ward by his guardian; and when the guardian is a married woman, her husband should be joined with her: *Carlisle v. Tuttle*, 30 Ala. 613. The petition for removal may be amended by adding the names of necessary parties and necessary additional allegations: *Id.* The transcript of the foreign record must show, not only that the guardian has given bond, but it must also set out a copy of such bond, so that the court may see that it is sufficient to protect the ward's estate: *Larry v. Craig*, 30 Ala. 631; *Carlisle v. Tuttle*, 30 *Id.* 613.

An infant's distributive share of an unsettled estate cannot be made the ground of an application for its removal, until the rendition of a final decree against the administrator: *Carlisle v. Tuttle*, 30 Ala. 613; *Larry v. Craig*, 30 *Id.* 631. A payment made by a guardian in Georgia to the guardian of a ward residing in Alabama, although not made according to the laws of Georgia regulating the removal of the estates of wards, will discharge the Georgia guardian from liability to account in the courts of Alabama: *Metcalfe v. Lowther*, 56 *Id.* 312. The California statute is in most respects like that of Alabama. It requires the foreign guardian to show, — 1. A transcript of the record of his appointment; 2. That he has entered upon the discharge of his duties; 3. That he is entitled, by the laws of the state of his appointment, to the possession of the estate of the ward; or he must produce and file a certificate, under the hand and seal of the clerk of the court having jurisdiction, in the country of his residence, of the estates of persons under guardianship, or of the highest court of such country, attested by a minister, consul, or vice-consul of the United States, resident in such country, that, by the laws of such country, the applicant is entitled to the custody of the estate of his ward, without the appointment of any court: Cal. Code Civ. Proc., secs. 1797, 1798. The Kentucky statute, Gen. Stats. Ky. 1873, p. 507, secs. 16, 17, is substantially the same as the Alabama statute. But it requires the foreign guardian to show to the satisfaction of the court that neither the minor nor any of his creditors in Kentucky will be prejudiced by the order. Section 2128 of the revised code of Mississippi provides as follows: "When any minor, or idiot, or lunatic resides out of this state, but has personal property in this state, or is entitled to a legacy or distributive share of an estate being administered in this state, or any debt or right in action of any sort, and a guardian has been appointed for such minor, idiot, or lunatic

in the state or country of his residence, such guardian shall be entitled to sue for, receive, and give a valid acquittance for such property, legacy, distributive share, or chose in action, upon the like terms on which executors and administrators who have qualified in other states or countries are authorized by this chapter to sue or receive without suit any property or debts due to their testator or intestate." This provision authorizes the guardian to remove the property to the jurisdiction of the forum from which he derived his power to act: *Watt v. Allgood*, 62 Miss. 38.

Sections 2839 and 2840 of the New York code of civil procedure provide that if the surrogate is satisfied that the case is within section 2838 of that code, quoted above, and that it will be for the ward's interest that ancillary letters of guardianship should be issued, he may make a decree admitting the exemplified copies of the foreign letters to be recorded, and grant ancillary letters accordingly. But before doing so, he must inquire whether any debts are due from the ward's estate to any citizen of New York; and if so, order them paid. Such ancillary letters are issued without security, and without an oath of office; and they authorize the guardian to demand and receive the personal property, and the rents and profits of the real property, of the ward, to dispose of them as a resident guardian could, to remove them from the state, and to maintain or defend any action or special proceeding in the ward's name. In *Braswell v. Morehead*, Busb. Eq. 26, it was held that where a testator bequeathed certain slaves to his infant granddaughter, and if she died before her arrival at twenty-one years of age, then over, her guardian residing in another state could not remove the slaves beyond the limits of the state of North Carolina against the wishes of the remainderman. Money received by a guardian in a foreign jurisdiction must be accounted for in California by the guardian, unless he shows positively that he has accounted for the same funds abroad, any presumption arising being that the foreign authorities permitted the transfer of the funds for the purpose of having them subject to the jurisdiction of the common domicile of the guardian and ward: *Estate of Secchi*, Myr. Prob. Rep. 225.

FATHER IS NATURAL GUARDIAN OF HIS MINOR CHILD, and is entitled to his custody, care, and education: See *Taylor v. Jeter*, 81 Am. Dec. 202, note 208, where other cases are collected.

JURISDICTION OF CHANCERY OVER ESTATES OF INFANTS: See *Townsend v. Kendall*, 77 Am. Dec. 534, note 539, where other cases are collected.

THE PRINCIPAL CASE IS CITED IN *Thompson v. Bagleton*, 33 Ind. 301, and in *Whitworth v. Sour*, 57 Id. 109, to the point that a bill of exceptions cannot form part of the record, where it appears to have been presented and signed after the expiration of the time limited.

DAVIS v. CALLOWAY.

[30 INDIANA, 112.]

PROMISE BY ONE PERSON TO ANOTHER TO PAY LATTER'S INDEBTEDNESS TO THIRD PERSON may be enforced in equity by such third person, although he was not a party to the agreement. And if the promise be accepted by such third person, he may maintain an action thereon at law.

UNTIL AGREEMENT MADE FOR BENEFIT OF THIRD PERSON IS ACCEPTED by him, the parties thereto may rescind it.

PROMISE IS SUFFICIENT CONSIDERATION for a promise.

APPEAL. The opinion states the case.

W. A. Peele, for the appellant.

W. S. Ballenger, for the appellee.

By Court, GREGORY, J. Davis sued Calloway on a promise by the latter to pay the former one hundred dollars, in an agreement between Calloway and one Keplinger and others. The first paragraph of the complaint sets out a copy of the written agreement, which shows on its face a consideration passing from Keplinger and others to Calloway, for the promise of the latter to Davis. There is an averment of an indebtedness to the same amount from Keplinger to Davis. A demurrer was sustained to this paragraph. The plaintiff, under leave to amend, added two other paragraphs to the complaint. Demurrers were sustained to each, and a final judgment rendered against the appellant.

The second paragraph differs from the first in this: the consideration passing from Keplinger and others to Calloway is averred; and it is further alleged that after the execution of the agreement, the parties thereto, by mutual consent, by and between themselves, without the knowledge or consent of the appellant, rescinded and changed the terms of the contract, which had been fully executed as changed.

The third paragraph avers that on, etc., Keplinger was indebted to the plaintiff in the sum of one hundred dollars for professional services as attorney and counselor at law, and being so indebted, Calloway did, on, etc., promise to pay the plaintiff one hundred dollars, in consideration that Keplinger, his wife, and one Gwynn would agree, in writing, with said Calloway to the performance of certain things specified in the writing set out in the first paragraph of the complaint; that the writing was executed, and as a part of it, the appellee promised to pay in hand to the plaintiff one hundred dollars,

which was by the plaintiff accepted and agreed to, which was due and unpaid.

The court below erred in sustaining the demurrers to the first and third paragraphs of the complaint. Davis, as the creditor of Keplinger, could maintain an action on the promise of Calloway. This is not an open question in this state.

In *Cross v. Truesdale*, 28 Ind. 44, the rulings of this court were carefully reviewed; and it was held, in conformity with *Bird v. Lanius*, 7 Id. 615, *Day v. Patterson*, 18 Id. 114, and *Devol v. McIntosh*, 23 Id. 529, that an action can be maintained by one in whose favor such a promise is made, although he is not a party to the agreement.

By the code, the complaint can be regarded as a bill in chancery under the old practice. In equity, Davis had the right to enforce the promise of Calloway to pay the debt due him from Keplinger: *Devol v. McIntosh*, *supra*.

The third paragraph avers an acceptance of the promise of Calloway by Davis. This would be good at law. But the second paragraph shows that the agreement was rescinded by the parties thereto. Until the acceptance by Davis of the promise of Calloway, the parties to the agreement had the right to rescind. That paragraph is bad, and the court below committed no error in sustaining the demurrer to it. It is proper to state that there was no question as to parties raised by the demurrers.

It was not necessary to aver performance of the agreement by Keplinger and his co-obligors. The promise to pay Davis was not dependent, but was made in consideration of stipulations in the agreement of Keplinger and others.

The judgment is reversed, with costs, and the cause remanded, with directions to overrule the demurrers to the first and third paragraphs of the complaint, and for further proceedings.

THIRD PARTY, FOR WHOM BENEFIT CONTRACT WAS MADE, MAY MAINTAIN SUIT THEREON: *Machias Hotel Co. v. Coyle*, 58 Am. Dec. 712, note 714, where other cases are referred to; *Marlett v. Wilson*, 30 Ind. 242; *Mathews v. Ritenour*, 31 Id. 34; *Dunlap v. McNeil*, 35 Id. 317; *Helms v. Kearns*, 40 Id. 130; *Miller v. Billingsly*, 41 Id. 492; *McDill v. Gunn*, 43 Id. 319; *Campbell v. Patterson*, 58 Id. 67; *Whitesell v. Heiney*, 58 Id. 112; *South Side P. M. A. v. Cutler & S. L. Co.*, 64 Id. 566; *Fisher v. Wilmoth*, 68 Id. 451; *Clodfelter v. Hulett*, 72 Id. 141; *Rodenbayer v. Bramblett*, 78 Id. 214; *Thompson v. Parker*, 83 Id. 108, all citing the principal case.

PIERSOL v. GRIMES.

[30 INDIANA, 129.]

SPOILIATION OF INSTRUMENT BY STRANGER WITHOUT KNOWLEDGE OR CONSENT OF PARTIES in interest cannot change the rights or liabilities of those parties.

APPEAL. The opinion states the case.

P. S. Kennedy, for the appellant.

S. C. and L. B. Willson, for the appellee.

By Court, FRAZER, J. Piersol sued Grimes upon the assignment of a promissory note, alleging the assignment to have been made by indorsement to Barton (who is made a party to answer to his interest), and that Barton afterwards transferred the note and indorsement by mere delivery to the plaintiff, and that some one, without the knowledge or consent of the plaintiff, had erased the name of Barton in the assignment, and inserted the name of the plaintiff. The complaint also alleged facts showing due diligence in prosecuting the maker of the note to insolvency, etc. A demurrer to the complaint was sustained below, and error is assigned upon that ruling.

The opinion of this court in this case when formerly here (25 Ind. 246) is relied on to support the ruling of the court below. The last sentence of that opinion, if wrested from the connection and from the point then under consideration, would give some countenance to the position assumed. But that is not a fair construction of the language. It must be applied to the question then under consideration, which was merely whether Piersol could sue as indorsee, the indorsement having been changed without Grimes's consent by striking out the name of Barton and inserting that of Piersol. It was not intended to say more than merely to give a negative solution to that question.

But we have now a very different question. It is, whether the spoliation of an instrument by a stranger, without the knowledge or consent of the parties in interest, can change the rights or liabilities of those parties. Certainly it cannot. No member of this court has ever entertained a doubt upon that question, and on principle it is difficult to find any ground for a difference of opinion upon it.

Judgment reversed, with costs, and the cause remanded, with directions to overrule the demurrer.

From the decision on the former appeal in this case, reported under the name of *Grimes v. Piersol*, 25 Ind. 246, it appears that at the first trial in the lower court the defendant Grimes testified that he assigned and transferred the note in suit to T. C. Barton, and filled up the assignment to said Barton; and that the name of said Barton in the assignment had been erased by some one without his knowledge or consent, and the name of Isaac Piersol inserted over said erasure, without his knowledge or consent. This was all the evidence on that point given upon that trial, and the supreme court assumed that the facts were as stated by Grimes. In this state of the case the court in its former opinion said: "The question, then, presented is simply this: Where a promissory note is assigned by an indorsement in full, to a particular person named therein, can the assignee or his vendee, without the consent of the assignor, strike the name of the assignee from the indorsement, and insert in its stead the name of such vendee, and thereby enable him to sustain a suit upon the assignment, against the assignor, as upon an assignment made to himself? We think it clear that he cannot. . . . The indorsement of a negotiable note by the payee in blank carries with it the implied power that the person to whom it is delivered may fill up the indorsement with his own name, or the name of any other person he may desire, or leaving the indorsement in blank, he may transfer it by delivery, and any subsequent holder may fill up the indorsement to himself and sue upon it. But if the payee indorse such a note in full, as in the case at bar, the person to whom it is so indorsed cannot change or alter such indorsement by striking out his own name and substituting the name of another, but must himself indorse it in order to transfer it to another, for by indorsing it in full the payee declares his intent not to be made liable except to such person, or by the indorsement so made to him." The last sentence in the former opinion, to which reference is made in the opinion in the principal case, is as follows: "The change rendered it no longer the assignment of Grimes, and no recovery can be had against him upon it."

ALTERATION OF WRITTEN INSTRUMENT WITHOUT CONSENT OF PARTIES, EFFECT OF: See *Lewis v. Schenck*, 90 Am. Dec. 631, note 633, where other cases are collected. The spoliation of a writing made by a stranger without the knowledge or consent of the parties thereto does not affect the rights of such parties: *John v. Hatfield*, 84 Ind. 81; *Eckert v. Lewis*, 84 Id. 102, both citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Emmons v. Carpenter*, 55 Ind. 331, to the point that when the maker of a note signs it, and knowingly leaves a blank for the insertion of a date, and passes such note from his possession, he, by these acts, authorizes any one interested in the note to fill the blank date.

ROBINIUS v. LISTER.

[80 INDIANA, 142.]

OBJECTION TO ADMISSIBILITY OF DEPOSITION IN EVIDENCE MUST BE MADE BEFORE ENTERING ON TRIAL, and cannot be made afterwards, where the ground of the objection appears upon the face of the deposition.

TAXES ON LANDS MUTUALLY EXCHANGED BY WARRANTY DEEDS, which the parties to such deeds agree shall be set off against each other, are a part of the consideration; and in an action against the vendor by one deriving

title by warranty deed from the vendee to recover money paid by the plaintiff to remove the encumbrance so assumed by the vendee, parol evidence of the agreement concerning the taxes is admissible. And if, in such case, it be considered that the warranty of the vendor was broken, still the vendee could agree upon the damages, and, upon their payment, the breach would be satisfied.

APPEAL. The opinion states the case.

J. L. Ketchum and J. L. Mitchell, for the appellant,

L. Barbour and C. P. Jacobs, for the appellee.

By Court, RAY, C. J. This was an action commenced before a justice of the peace to recover money paid by Jane K. Lister to remove an encumbrance, consisting of taxes due on lands purchased by her from one Smith, who had received a conveyance of said land from appellant. The deeds from Robinius to Smith, and from the latter to Mrs. Lister, contained covenants of warranty against encumbrances. The husband of the appellee was joined with her in the action. A paragraph of answer was filed denying any privity of contract between the appellant and Mrs. Lister. In a second paragraph it was alleged that at the time of conveyance by Robinius to Smith of the land upon which the encumbrance existed, Robinius received a deed from said Smith for certain other land, and it was at the time agreed between them that the taxes remaining due upon the lands so mutually exchanged and conveyed should be set off against each other, and that the taxes on the land received by Robinius exceeded in amount the taxes on the land conveyed by Robinius. In the common pleas court, the appellees, on the trial, offered to read the deposition of John Lister, the husband of Mrs. Lister, to which the appellant objected, but the deposition was admitted. This ruling was correct. The objection appeared upon the face of the deposition, and should have been made before entering upon the trial. Our statute requires that "all objections to the validity of any deposition, or its admissibility in evidence, shall be made before entering on the trial, not afterwards," unless the deposition does not disclose the ground of the objection: 2 G. & H. 178, sec. 266.

The appellant, in defense, offered to prove the facts set out in his answer, and that he had paid taxes due upon the land received from Smith, in amount exceeding the sum for which the action was brought. This evidence was excluded by the court. This was error. If Mrs. Lister elected to sue upon the

covenant in the deed from Robinius to Smith, she certainly could stand in no better position than Smith would have occupied had he brought the action. The agreement between Robinius and Smith made the tax upon the land conveyed part of the consideration for the deed, and proof of the covenant was admissible: *Pitman v. Conner*, 27 Ind. 337. Or, if it be considered that the warranty of Robinius was broken, still Smith could agree upon the damages, and upon their payment the breach was satisfied. The evidence should have been admitted, as it constituted a defense to the action.

The judgment is reversed, and the cause remanded for a new trial.

CONSIDERATION OF DEED MAY BE EXPLAINED AND VARIED BY PAROL: See *Buckley's Appeal*, 88 Am. Dec. 468, note 471, where other cases are collected. Parol evidence may be given to show the real consideration of a deed, and that the purchaser took the conveyance subject to encumbrances, and agreed to discharge them in addition to the consideration named in the deed: *Carver v. Louthain*, 38 Ind. 536; *McDill v. Gunn*, 43 Id. 319; *Stearns v. Dubois*, 55 Id. 260, all citing the principal case. The consideration may be shown by parol to be different from that stated in the deed: *Wallace v. Goff*, 71 Id. 295; *Wels v. Rhodius*, 87 Id. 6, both citing the principal case.

MOTION TO SUPPRESS DEPOSITION MUST BE MADE BEFORE TRIAL BEGINS, and cannot be made afterwards, when the ground of the objection appears on the face of the deposition: *McGinnis v. Gabe*, 78 Ind. 461, citing the principal case

ROWE v. BECKETT.

[80 INDIANA, 154.]

WHERE RAILROAD COMPANY CONVEYS TO TRUSTEES TO SECURE PAYMENT OF BONDS issued by it certain lands divided into tracts, each described, numbered, and valued, reserving to itself the power to sell any portion of the land at its valuation, and the trustees having power to convey in fee, upon the surrender to them by the company of bonds equal in amount to the value of the land sold, the power of the trustees to convey is a power coupled with an interest, and requires only a substantial compliance with its terms. A deed from the trustees passes the legal title, and in an action against their grantee, under the Indiana code, for the recovery of real property, on a complaint averring the legal right of the plaintiff to the possession, the equities of the plaintiff cannot be inquired into.

IN ACTION FOR RECOVERY OF REAL PROPERTY, PLAINTIFF CAN ONLY RECOVER ON LEGAL TITLE to the possession paramount to the legal or equitable title of the defendant.

WORDS "RELEASE, REMISE, AND FOREVER QUITCLAIM" USED IN DEED of land pass a title in fee to the alienee.

POSSESSION OF GRANTOR IS NOT ADVERSE TO TITLE OF HIS GRANTOR.
CONVEYANCE OF LAND PENDING SUIT TO SET ASIDE DEED thereof is not void for champerty, if it is made to one who had no connection with or knowledge of the action.

APPEAL. The opinion states the case.

J. Smith, C. E. Shipley, A. Kilgore, J. Davis, and C. Fox, for the appellants.

T. J. Sample and W. March, for the appellees.

By Court, GREGORY, J. Suit by the appellants against the appellees to "recover real property." The complaint avers that the plaintiffs "are the owners in fee-simple, and entitled to the possession," of the land in controversy, and that the defendants hold possession of the same without right.

The defendants answered by the general denial. Beckett answered that he was the owner of the land, setting forth a deed of conveyance thereof from Thomas Corwin and Thomas J. Sample to James Sample, and a deed from the latter to Beckett. The deed from Corwin and Sample to James Sample was a conveyance made under a power contained in a deed of trust from the Cincinnati, New Castle, and Michigan Railroad Company. The plaintiffs replied by the general denial, and averring that the deed from Corwin and Sample to James Sample was void.

Trial by the court, finding for the defendants, and that Beckett was the equitable owner, and had the legal title to the land. The plaintiffs moved for a new trial. The court below overruled the motion. A bill of exceptions contains the evidence.

The trust deed from the railroad company to Corwin and Sample was executed in 1853, and conveyed to them forty-four tracts of land (each of which was described, numbered, and valued), in trust, to secure the payment of bonds issued by the company, and put upon the market. The deed contained the following: "And it is hereby expressly agreed and understood that the said party of the first part reserves the right to sell any portion of the property herein at a price not less than the sum herein named as the appraised value thereof, or a proportionate price for any portion of any of the said several pieces of property; and whenever the said party of the first part, having made such sale, shall purchase and surrender to the said parties of the second part, or their successors in said trust, to be canceled, an amount of the bonds

herein specified and designated to be secured by this deed of trust, equal to the appraised value of any portion of said property as herein specified, or of a proportional part of the appraised value of any one of said several pieces of property, then the said party of the second part, or their successors in said trust, shall execute and deliver to such person or persons as the said party of the first part shall designate, a deed in fee-simple for such portion of said property."

The deed from Corwin and Sample to James Sample, executed in July, 1856, contains among others the following recitals: "And whereas the corporate name of the said Cincinnati, New Castle, and Michigan Railroad Company has been legally changed to that of the Cincinnati and Chicago Railroad Company, and which said Cincinnati and Chicago Railroad Company is now legally vested with all the rights which belonged to the said Cincinnati, New Castle, and Michigan Railroad Company; and whereas the said Cincinnati and Chicago Railroad Company have sold a tract of land included in the property conveyed as aforesaid by the said deed of trust, and hereinafter described, and have surrendered to the said Thomas J. Sample and Thomas Corwin, to be canceled, an amount of said bonds equal to the appraised value of the said land as specified in the said deed of trust, to wit, six thousand dollars, and having designated the said James Sample as the person to whom the deed of conveyance of the said lot shall be executed and delivered," etc.

The deed from James Sample to Beckett was executed in November, 1856. In 1857, Rowe commenced proceedings in the Delaware circuit court to foreclose the deed of trust. A decree was entered in June, 1860, as follows: "And it is ordered, adjudged, and decreed by the court that unless the said defendant, the Cincinnati and Chicago Railroad Company, pay and satisfy said sums and costs within thirty days herefrom, the sheriff of Delaware County proceed to advertise and sell as other lands are sold on execution, giving at least thirty days' notice in two newspapers of good circulation in the state of Indiana, the following real estate, or so much thereof as may be necessary to pay and satisfy said judgments, interest, and costs, that is to say [here the description of all the lands and town lots, as set out in the deed of trust, is inserted in the decree, except No. 8]; and on the sale thereof according to law, and the payment of the purchase-money, that said

sheriff execute a good and sufficient deed in fee-simple to the said purchasers, and that the equity of redemption of said defendant, the said Cincinnati and Chicago Railroad Company, and all others claiming under or through her after the date of the execution of said deed of trust to Corwin and Sample, except such lands as have been purchased with bonds secured by said deed of trust, be and the same shall be thenceforth forever barred and foreclosed in and to all said premises so sold and conveyed by said sheriff; that a copy of this decree, duly certified by the clerk of the Delaware circuit court, under the seal of said court, be, and the same shall be, sufficient authority to said sheriff to execute said decree. And it is ordered that if said premises do not sell for a sum sufficient to pay and satisfy said judgments, interest, and costs, accrued and to accrue, said plaintiffs have execution to collect the residue. It is further ordered that the foregoing described lands be sold in parcels."

Beckett was not a party to this decree, unless he was included in the description of "all persons holding bonds or otherwise interested in the trust." He was not a party holding bonds. Was he otherwise interested in the trust? If the deed from Corwin and Sample to James Sample vested in the latter the legal as well as the equitable title in and to the land in controversy, then Beckett had no interest in the trust. By the conveyance the land therein alienated was taken out of the hands of the trustees, and from thence ceased to be any part of the trust.

The exception in the decree of "such lands as have been purchased with bonds secured by the deed of trust" takes them out of the operation of the entire decree. Any other construction would make the exception meaningless. To say that the exception was confined to the foreclosure, and that it did not extend to the order of sale, is to make it amount to nothing.

It is claimed that the deed from Corwin and Sample to James Sample is void for the want of a strict compliance with the terms of the power in the deed of trust under which it was made. There was no evidence offered on the trial as to the circumstances attending the execution of the deed, other than the recitals contained in it. The first inquiry which meets us at the threshold is this: Is the power in the deed of trust, under which the deed in question was executed, a naked power, or one coupled with an interest? The legal estate in the land

was conveyed by the railroad company to the trustees. The power of sale was reserved to the company as mortgagor; the trustees were empowered to make the conveyance on the compliance by the company with the conditions specified in the power.

In *Hunt v. Rousmanier*, 8 Wheat. 174, Chief Justice Marshall thus defines what is meant by "a power coupled with an interest": "Is it an interest in the subject on which the power is to be executed, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing." After stating that a power to A to sell for his own benefit would not give him an interest, nor would it if his power was to sell for the benefit of B, he adds: "A power to A to sell for the benefit of B, ingrafted on an estate conveyed to A, may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is therefore not dependent on the life of the person who created it."

The trust deed containing the power conveyed to Corwin and Sample the legal estate in the land, and enabled them to make the conveyance in their own names; and therefore the power to do so was within the meaning of the phrase "coupled with an interest."

Mr. Washburn, in his work on real property, in speaking of these trust mortgages, says: "It is uniformly held, wherever they have been adopted, that such deeds vest in the trustee an actual legal estate, and not a mere mortgagee's lien": 2 Washburn on Real Property, 3d ed., 80, sec. 11.

It is said, in *Rowan v. Lamb*, 4 G. Greene, 468: "*Prima facie*, plaintiff's exhibits showed him to be an owner of the property. He claimed title under McKee by virtue of a deed of trust, executed in August, 1842, to Glasgow and Collier for the benefit of James Harrison, a creditor. Under these trustees, who were not only vested with power to sell, but also with the legal title, the plaintiff appears by his exhibit in the light of an innocent purchaser. Where trustees are thus vested with the title as well as the power, it is not necessary to show

that strict compliance with the directions of the power as it would be if the power was not coupled with the title."

In *Reece v. Allen*, 5 Gilm. 236 [48 Am. Dec. 336], Caton, J., in speaking for the court, says: "The only remaining question is, whether the grantee of the trustee was bound to show that the conditions of the trust deed had been complied with. This precise question was decided by the supreme court of appeals of Virginia, in the case of *Taylor v. King*, 6 Munf. 358 [8 Am. Dec. 746], and also in *Harris v. Harris*, 6 Id. 367. Indeed, in the former case the court went further, and decided that the grantee of the trustee should recover in ejectment, although the jury had specially found that the trustee and purchaser were both guilty of fraud in the transfer. We do not hesitate to agree with the court that the conveyance passed the legal title to the estate, and that it did not devolve upon the purchaser to show that the trustee in making the sale had complied with the conditions specified in the trust deed. If the grantee took the title in fraud of the rights of any of the parties, a court of chancery, within whose peculiar jurisdiction such questions are, would either set aside the sale, or treat him as trustee, and compel him to perform the trust."

In *Bayard v. Colefax*, 4 Wash. C. C. 38, it is said by the court that "the right of the surviving trustee, clothed as he was with the legal estate in fee-simple, to convey the same to whom and in what manner he might think proper, cannot be questioned in a court of law, nor can the title of his grantee be impugned, unless it be by some person having a better legal title in himself to oppose to it."

If these authorities enunciate the law, it seems to us clear that the deed from Corwin and Sample, as trustees, to James Sample, vested in the latter the legal title to the land in question, independent of the recitals in it. It is true that the code has abolished all distinction between law and equity, but it will hardly be contended, under the forms of pleading adopted in the case under consideration, that the plaintiffs below could resort on the trial to an equitable right of having the deed made by the trustees set aside for a failure to comply with the conditions contained in the power.

A defendant in an action for the recovery of real property, under the general denial, may show any legal or equitable defense he may have: 2 G. & H. 283, sec. 596. But the plaintiff in his complaint must state the facts constituting the cause of action in plain and concise language, without repetition,

and in such manner as to enable a person of common understanding to know what is intended: 2 Id. 70, sec. 49, cl. 2. And when the allegation of the claim to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a variance, but a failure of proof: 2 Id. 116, sec. 96.

The complaint in this case avers that the plaintiffs are the owners in fee of the land; proof that they were the equitable owners, and as such had the right to have the deed from the trustees set aside for a failure to comply with the conditions of the power, would not be a variance, but a failure of proof, under the code.

Under a complaint like this, the plaintiff can only recover on a legal title to the possession paramount to the legal or equitable title of the defendant. In *Stehman v. Crull*, 26 Ind. 436, it was held that "the action 'to recover the possession of real property,' under the code, where the complaint is on the legal title, takes the place of the old action of ejectment, and the plaintiff must show a legal title to the possession before he can recover." The appellees had the right to offer the deed from the trustees, to show that the legal title to the land was not in the appellants, whose title was derived from the sheriff's sale made under the execution issued on the decree of foreclosure.

In *Bank of United States v. Benning*, 4 Cranch C. C. 81, it was held that if the deeds were offered only to show the transmission of the legal title, the truth of the recitals need not be proved *aliunde*.

We think the recitals in the deed from the trustees were *prima facie* proof of the matters therein stated, and a majority of the court rule that they are sufficient to uphold the conveyance to James Sample. It has been seen that the power vested in the trustees to convey was a power coupled with an interest; in such a case the law only requires a substantial compliance with the terms of the power.

The surrender to the trustees, to be canceled, of bonds secured by the deed of trust, to the amount of the valuation of the land conveyed, was the substantial thing provided for; and this we think the recitals show was done. It is claimed that the recitals do not show that the bonds surrendered were ever put in circulation.

We think that the legal presumption arising from the transaction as it appeared in evidence was, that the bonds

described in the trust mortgage were sold by the railroad company. It is true that the deed of trust was executed before the bonds had a legal existence; but the entering upon the execution of the trust shows that bonds were sold; what amount does not, however, appear. It is fair to presume, nothing appearing to the contrary, that the trust deed accomplished its purpose. Indeed, it is difficult to see how bonds could be surrendered to be canceled that never had any vitality. If the bonds were put in circulation, it could make no difference to the holders thereof how that portion of them which was surrendered was obtained by the railroad company. The holders of the other bonds had no interest whatever in that matter. The cancellation left them with the same security for their debt as they had before. When six thousand dollars' worth of the land was conveyed by the trustees, just that amount of bonds was canceled, leaving the residue of the lands as a security for that much less of the mortgage debt.

It was urged in argument that the deed from the trustees passed no title to James Sample, because it was merely a release. The effective words of conveyance used in this deed are these: "Do hereby release, remise, and forever quitclaim unto the said James Sample, his heirs and assigns forever, all their right, title, interest, and estate, legal and equitable, in the following-described premises, to wit," etc. This is "a good and sufficient conveyance in quitclaim to the grantee, his heirs and assigns": 1 G. & H. 260, sec. 13. A quitclaim deed is as effectual to convey land as a deed with full covenants: *McConnel v. Reed*, 4 Scam. 117 [38 Am. Dec. 124]. This was recognized as the rule in *Hamilton v. Doolittle*, 27 Ill. 478. Mr. Washburn says: "While a deed of simple release, made to one who has neither an estate in nor possession of land, would be merely void, a form of deed of the nature of a release, commonly known as a 'quitclaim deed,' has long been in use in this country, and has not only been regarded, practically, as a mode of conveying an independent title to the real property, but is by the statutes of some of the states declared to be effectual for that purpose": 3 Washburn on Real Property, 3d ed., 309.

There is a labored brief by the counsel of the appellants, citing numerous authorities, but in our view they are not applicable. The turning point of the case in judgment is, that the power in the trustees to convey is a power coupled with

an interest. The cases cited relate to the execution of naked powers, not coupled with an interest. It is claimed that the deed from the trustees is void, because Jacob Carver was in the adverse possession of the land at the time of the conveyance, and had an action pending for it, to quiet his title and possession. Carver conveyed the land to the railroad company. His possession could not be adverse to that of his own alienee and those claiming under it.

Carver's suit was brought to rescind his conveyance. He failed in his action. It is true, his suit was pending when the trustees conveyed to James Sample. Such an action could not have the effect of suspending the execution of the trust. James Sample was in no way connected with the suit, and his right could not be affected by the pending litigation. The evidence does not make a case of champerty within the rule recognized in the case of *West v. Raymond*, 21 Ind. 305, cited by appellants' counsel.

The judgment is affirmed, with costs.

QUITCLAIM DEED, EFFECT OF: See *Waters v. Waters*, 89 Am. Dec. 540; *Huckabee v. Billingsly*, 50 Id. 183.

ADVERSE POSSESSION, WHAT CONSTITUTES: See *Dean v. Brown*, 87 Am. Dec. 555, note 558, where other cases are collected. The possession of a grantor is not adverse to the title of his grantee: *Record v. Ketcham*, 76 Ind. 487; *Ronan v. Meyer*, 84 Id. 393, both citing the principal case.

POWERS WHEN MUST BE STRICTLY PURSUED: See *Sears v. Livermore*, 85 Am. Dec. 564, note 568, where other cases are collected. Where a power in trustees is coupled with an interest, the law requires only a substantial compliance with the terms of the power: *Rowe v. Lewis*, 30 Ind. 167, citing the principal case.

IN ACTIONS UNDER INDIANA CODE FOR RECOVERY OF REAL PROPERTY, upon a complaint averring the legal right of the plaintiff to the possession, he must recover on a legal, not an equitable, title: *Groves v. Marks*, 32 Ind. 320; *Brown v. Freed*, 43 Id. 254; *Burt v. Bowles*, 83 Id. 54; *Hays v. Carr*, 83 Id. 287; *Stout v. McPheeters*, 84 Id. 589, all citing the principal case.

CHAMPERTY: See *Schafersman v. O'Brien*, 92 Am. Dec. 708, note 713, where other cases are collected. Champertous contracts are void: *Greenman v. Cohee*, 61 Ind. 206, citing the principal case. A conveyance of land pending a suit to set aside a deed thereof is not void for champerty, where it is made to one who had no connection with or knowledge of the action: *Fraser v. Harris*, 51 Id. 158, also citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Glendy v. Lanning*, 68 Ind. 146.

MINOT v. MITCHELL.

[80 INDIANA, 228.]

ERRONEOUS INSTRUCTION TO JURY CANNOT BE MADE AVAILABLE, ON APPEAL, as error, by the party on whose motion it was given.

PARTY CANNOT BE TREATED AS TRUSTEE, WHO, WITHOUT FRAUD, PURCHASES LAND at sheriff's sale, with his own money, taking the title in his own name, upon a verbal agreement to hold it for the benefit of the execution debtor.

APPEAL. The appellants, Jane and Mary M. Minot, sued John and Charles S. Mitchell, alleging in their complaint that in 1855, Samuel Minot, the husband of said Jane, and father of said Mary M., being unable to pay his debts, many of which had passed into judgments, applied to his friend William Mitchell, the father of the defendants, who entered himself replevin bail for the stay of execution on all the judgments on which the stay had not expired, amounting to about \$6,000; that said Samuel then owned real estate of the value of \$25,000, upon which the sheriff had levied an execution amounting to \$3,226.13; that said William agreed to bid in said property for said Samuel at the sheriff's sale in his own name, pay the purchase-money, and hold said land in trust as security for the money advanced in the purchase thereof, and also to secure him as replevin bail upon said judgments; that it was agreed that said Samuel should retain possession of said land, and make sales thereof as fast as the same could be done, the said William to make conveyances and receive the purchase-money, and apply the same in payment of the money so advanced by him, and the residue to be reconveyed to said Samuel; that said William did accordingly attend said sale and bid in said property for said sum of \$3,226.13; that said Samuel afterwards sold and assigned to said William a large stock of goods and his best accounts, the whole amounting to about \$15,000, to be disposed of in like manner, the residue to be paid to said Samuel; that \$1,400 due to said Samuel by one Iddings was by him paid to said William on a like trust; that said William, about the 6th of March, 1856, procured a general warranty deed to be written, conveying said land to him for the nominal consideration of \$1,000, and by making certain representations to said Samuel, who had been stricken with paralysis, and to said Jane, who was ignorant of her rights, induced them to execute said deed; that nothing was paid by said William in con-

sideration therefor, and that said Samuel retained possession and enjoyed the profits of said property as before, and exercised acts of ownership over it with said William's consent as before; that the representations then made by said William were false and fraudulent; that at the time of the execution of said deed said William had in his hands of the avails of said property more than enough to pay him for all he had advanced, and to pay all of said Samuel's debts for which he had become surety; that said Samuel died intestate in 1857; that said William had in his lifetime received in all the sum of \$28,400 more than the amount advanced by him, the judgments stayed, and the debts paid by him; that said William has since died intestate, leaving the said defendants his only heirs at law; that since his death said defendants have sold portions of said lands, but what portions or for what price the plaintiffs are not informed; that plaintiffs have demanded a settlement of said trust estate, payment of the amount due, and a reconveyance and the possession of all said trust lands not conveyed by defendants or their ancestor, which they refuse. The prayer was for an account for judgment for the amount found due for possession of the undisposed of portion of said lands and other proper relief. The defendants answered, denying the fraud charged, and alleging that the trust set up was not created in writing, and that Mitchell in his lifetime fully executed the trust, and settled the same with Minot. On the trial before a jury the plaintiffs offered to introduce Jane Minot, one of the plaintiffs, as a witness, to prove the allegations of the complaint, but the court held that she was incompetent to prove any matter which occurred prior to the death of William Mitchell. The plaintiffs then offered to prove by her that the first information or suspicion she had of any fraud or improper conduct on the part of William Mitchell, in relation to the matters charged in the complaint, was after the death of said Mitchell, but the court refused to permit her to testify as to such matters. The court, at the defendant's request, instructed the jury as follows: "If Mitchell merely intended the money advanced as a loan, and took the sheriff's deed simply as a security for this and his liability as replevin bail, then the sheriff's deed would operate simply as a mortgage, and Minot or his heirs might redeem; but if the sheriff's deed was, as alleged in the complaint, a mortgage, the deed of Minot and wife of the 6th of March, 1856, would convey to Mitchell the equity of redemption of Minot and

Mrs. Minot's contingent interest, and thus make Mitchell's title perfect, unless that deed was void, not for want of consideration, but void for the precise misrepresentations alleged in the complaint, and the incapacity of Minot there stated; that if Mitchell bought the land at sheriff's sale in pursuance of a verbal understanding, that he would dispose of it, and with the proceeds pay all Minot's debts, you should find for the defendant; for in such case the land could not be held as alleged in the complaint. If Mitchell bought the land, not for the purpose of selling it and paying all Minot's debts, but simply to secure himself, then you will inquire whether the deed of March 6, 1856, was obtained by Mitchell's fraud as charged. If it contains covenants of warranty, and purports to have been made in consideration of one thousand dollars paid by Mitchell to the grantors, it can only be attacked for the fraud alleged in the complaint. The plaintiffs are estopped to allege anything against that deed unless fraudulent. Mitchell had a right to buy Minot's equity and Mrs. Minot's interest, and if this deed was not void for fraud, it conveyed all the interest of Minot and wife in the land. The burden of establishing fraud in this deed is on the plaintiffs. If the deed purports to have been made in consideration of one thousand dollars, the recital is *prima facie* evidence of its payment, and unless disproved by the plaintiffs, must control you on that point. For the purpose of raising a trust on this deed, the plaintiffs would not be permitted to disprove such payment. The fourth paragraph of the answer denies the fraud charged, and denies that the trust was created in writing. This paragraph is pleaded to the whole action, and as there is no proof that the trust was created in writing, your verdict must be for the defendant, unless the fraud charged has been proved to your satisfaction. Fraud is never presumed, but must be proved by the party who asserts it." Plaintiffs excepted to this instruction. Verdict for the defendant. The court overruled motions for a new trial and for a *venire de novo*, and rendered judgment on the verdict, and plaintiffs excepted.

W. H. Coombs and W. H. H. Miller, for the appellants.

J. L. Worden and J. Morris, for the appellee.

By Court, RAY, C. J. On the trial, the court, on the motion of the appellants, the plaintiffs below, by an instruction, limited the recovery in this action, in any event, to the lands still

undisposed of, and the proceeds of the lands sold by Mitchell or his heirs since the death of Minot. If, therefore, any error was committed by the court which alone affected the question of a recovery for the personal property, such error would not be available here.

So far as the real estate is involved, the complaint does not make Mitchell a trustee. His purchase at sheriff's sale was with his own money, and no fraud is charged in such purchase. It is not alleged that he prevented others from bidding on the property by representing that he was purchasing for the benefit of Minot.

It is a simple averment of a verbal agreement that Mitchell should purchase the property at sheriff's sale, and take the title in his own name, he agreeing to hold it for the benefit of Minot. According to the complaint, he did so purchase. The legal title vested in him without fraud. Can he be treated as a trustee? The rule is thus stated: "But in no case will the grantee be deemed a trustee, if he used no fraud or deceit in getting his title, although he verbally promised to hold the land for the grantor": Browne on Statute of Frauds, 92, sec. 95.

This practically ends the case. The rulings of the court upon the paragraphs of the answer pleading the statute of limitations are of no importance. The paragraphs were sustained, but no such issue was submitted to the jury by the charge of the court, as the transaction was treated as a mortgage, which certainly is a most favorable view for the appellants. The jury found that there was no fraud in the purchase at sheriff's sale, and that the subsequent deed was made without fraud, and for the purpose of making Mitchell's title absolute.

Upon the exclusion of the evidence of Jane Minot, the widow of the ancestor of the heirs who sued, it is sufficient to say that she was not offered to prove fraud in the purchase at sheriff's sale, nor would such evidence have been proper or relevant to the averments of the complaint.

The judgment is affirmed, with costs.

PURCHASER BUYING FOR OWNER AT JUDICIAL SALE WHEN TRUSTEE: See *Ryan v. Doz*, 90 Am. Dec. 696, note 708. A person who, without fraud, purchases land at a sheriff's sale, with his own money, taking the title in his own name, upon a verbal agreement to hold it for the benefit of the execution debtor, cannot be treated as a trustee for such debtor: *Pearson v. East*, 36 Id. 28; *Watson v. Erb*, 33 Ohio St. 49, both citing the principal case. In no case will a grantee be deemed a trustee, if he use no fraud or deceit in

getting his title, although he verbally promise to hold the land for the grantor: *Newton v. Taylor*, 32 Id. 410, also citing the principal case.

VERBAL AGREEMENT BY PARTY PURCHASING AT SHERIFF'S SALE to hold the title for the benefit of the execution debtor is within the statute of frauds: *Rucker v. Steelman*, 73 Ind. 402, citing the principal case; but see *Miller v. Antle*, 92 Am. Dec. 495.

PERRY v. ROBERTS.

[80 INDIANA, 244.]

ASSIGNMENT OF NOTE GIVEN TO SECURE PURCHASE-MONEY OF LAND carries with it the vendor's lien on the property; and it makes no difference that the payor is under the disability of coverture at the time of the execution of the note.

COVERTURE IS NOT BAR TO SUIT TO ENFORCE VENDOR'S LIEN on real estate.

APPEAL. The opinion states the case.

A. C. Downey, for the appellants.

S. Carter, or the appellee.

By Court, GREGORY, J. This suit was commenced by one John W. Bledsoe against Kezia B. Perry and Robert A. Knox, on notes and mortgage, executed by Perry to Knox, for the purchase-money of the mortgaged premises, and by the latter assigned to the plaintiff. During the progress of the suit, the cause of action was transferred by assignment to the appellee, who was allowed by the court below to be substituted plaintiff in the action.

The complaint, as finally amended, is in two paragraphs: the first, for the vendor's lien; the second, on the notes and mortgage.

Kezia B. Perry demurred to the complaint, which was overruled. She then answered, — 1. The general denial; 2. Coverture; 3. That the transfer of the vendor's lien was made after the suit was commenced.

Demurrers were sustained to the second and third paragraphs of the answer. Trial by the court, finding for the plaintiff, and final decree. The evidence is not made a part of the record.

The point made on the demurrer to the complaint is the same as that raised by the demurrer to the third paragraph of the answer. The notes and mortgage were transferred by assignment before the commencement of the action, but as the

mortgagor was a married woman at the time of their execution, some doubts arose as to whether this assignment transferred the vendor's lien. To obviate this difficulty, Knox, the mortgagee, after the commencement of the action, executed to the plaintiff, Bledsoe, a formal instrument of assignment of the vendor's lien.

It is well settled in this state that the assignment of a note given to secure the purchase-money for real estate carries with it the vendor's lien on the property: *Kern v. Hazlerigg*, 11 Ind. 443 [71 Am. Dec. 360]; *Fisher v. Johnson*, 5 Id. 492; *Brumfield v. Palmer*, 7 Blackf. 227.

It can make no difference in principle that the payor is under disability of coverture.

The court committed no error in overruling the demurrer to the complaint, and in sustaining the demurrer to the third paragraph of the answer.

Coverture was pleaded in bar of the whole action. It was no defense to the vendor's lien. The court therefore was right in sustaining the demurrer to the second paragraph of the answer.

The decree was for a foreclosure of the mortgage. In the absence of the evidence, we must presume in favor of the action of the court below. Such a decree was proper under the issue made on the second paragraph to the complaint.

The judgment is affirmed, with costs, and five per cent damages.

WHETHER ASSIGNMENT OF NOTE GIVEN TO SECURE PURCHASE-MONEY CARRIES WITH IT VENDOR'S LIEN, see *Richards v. Leaming*, 81 Am. Dec. 239, note 251, where the cases on both sides of this question are collected. In Indiana, a vendor of real estate may have a lien thereupon for unpaid purchase-money against a married woman grantee: *Haskell v. Scott*, 56 Ind. 567; *Huffman v. Cauble*, 86 Id. 593, both citing the principal case.

WAIVER OF VENDOR'S LIEN: See *Burnap v. Cook*, 85 Am. Dec. 507, note 513, where other cases are collected. The taking of notes from the vendee's husband is not a waiver of a vendor's lien: *Martin v. Cauble*, 72 Ind. 74, citing the principal case.

AMERICAN EXPRESS COMPANY v. HOCKETT.

[30 INDIANA, 250.]

IN INDIANA, EXPRESS COMPANIES ARE COMMON CARRIERS.**COMMON CARRIERS BY LAND ARE BOUND TO DELIVER GOODS TO CONSIGNEE** at his residence or place of business, where, from the nature of the parcels, this is the more appropriate place for their delivery. It is not sufficient for the carrier to leave them at his public office, unless by express permission, or by a usage so established and well known as to be equivalent to such permission.**LIABILITY OF COMMON CARRIER ENDS IF CONSIGNEE IS ABSENT**, and the carrier cannot, after diligent inquiry, find him or ascertain his place of residence or business; but it is still the duty of the carrier to take care of the goods by holding them himself, or by depositing them with some suitable person for the consignee, and in such case the person holding the goods becomes the bailee of the owner or consignee, and is bound only to reasonable diligence.**EXPRESS COMPANY IS LIABLE FOR GOODS STOLEN FROM ITS OFFICE**, unless it makes diligent inquiry to find the person to whom it is bound to deliver them, or exercises reasonable care to preserve them, upon its failure, after the exercise of due diligence, to find the consignee.**APPEAL.** The opinion states the case.*J. Davis*, for the appellant.*J. A. Harrison*, for the appellee.

By Court, **ELLIOTT, J.** Hockett sued the American Express Company to recover the value of a package containing one hundred dollars in currency, received by the company at Chillicothe, Missouri, to be carried and delivered to Hockett at Andersontown, Indiana, which the company failed to do.

An answer was filed, to which a demurrer was sustained, and the company excepted. On a refusal of the company to answer further, judgment was rendered for Hockett. The company appeals. The ruling of the court on the demurrer to the answer presents the only question in the case.

The answer alleges "that the package of money mentioned in the complaint was duly received at the office of the defendant in Anderson, Madison County, Indiana. The defendant, upon inquiry, could not find the residence of said plaintiff to be in said town of Anderson, or in the vicinity; and being ignorant of the real place of residence or post-office address of said plaintiff, the said defendant, on the day of the arrival of said package, wrote a notice informing the plaintiff of the arrival of said package of one hundred dollars at the said office of said defendant, and that the same was ready for delivery, and then and there inclosed the said notice in an

envelope, indorsed 'Jonathan Hockett, Anderson, Indiana,' and then and there duly stamped the same, and when so directed and stamped, dropped the same into the post-office at Anderson; and then and there placed said package of money in a safe owned by the defendant, wherein said defendant placed and kept all money packages arriving by express for parties, and then and there safely locked the same; said package remaining in said safe thus securely locked up for several days, no one calling for the same until after said package had been stolen by thieves and burglars, who in the night-time violently broke into the office of said defendant where said safe was situate, and without the knowledge of said defendant, broke open said safe; and feloniously stole, took, and carried away said package of money, without any fault or neglect of the defendant," etc.

Express companies in this state are declared by statute (1 G. & H. 327) to be "common carriers, and subject to all the liabilities to which common carriers are subject according to law." As a general rule, common carriers by land are bound to deliver the goods to the consignee at his residence or place of business, where, from the nature of the parcels, this is the more appropriate place for their delivery. Nor is it sufficient that they are left at the public office of the carrier, unless by express permission, or a usage so established and well known as to be equivalent to such permission: 1 Parsons on Contracts, 3d ed., 660. Goods carried by railroad companies form such an exception: *Banasmer v. Toledo etc. R. R. Co.*, 25 Ind. 434 [87 Am. Dec. 367]. But if the consignee is absent, and the carrier after diligent inquiry cannot find him, or ascertain the place of his residence or business, then the liability as carrier is deemed at an end; but it is the duty of the carrier to take care of the goods, by holding them himself, or depositing them with some suitable person for the consignee, and in such case the person holding the goods becomes the bailee of the owner or consignee, and is only bound to reasonable diligence.

The answer in this case alleges that the defendant, "upon inquiry," could not find the residence of the consignee to be in the town of Anderson, or in the vicinity, and being ignorant of his real place of residence or post-office address, etc. The inference from the answer is, that the inquiry, whatever it was, was made of some one at defendant's office, for it seems that immediately after the arrival of the package the inquiry

was made, the package deposited in the safe, and the notice prepared to be dropped in the post-office. But if not made there, where and of whom was it made? Did the agent of the company who made it content himself with asking the first person he met, whether resident or stranger, or did he make the inquiry of several? or in other words, did he make diligent and careful inquiry to ascertain the residence of the consignee? The law required this to be done, but the answer does not aver that it was done. Again, the answer does not aver that the plaintiff, or his place of business, if any, could not easily have been found. For aught that appears in the answer, the consignee may have had an office or place of business in Anderson, where he could readily have been found.

Nor does the answer show that reasonable care was taken of the package. It alleges that it was deposited in a safe in the company's office, in which other money packages received by the company were deposited, and the safe securely locked, where it remained until the office and safe were broken open by burglars and the package stolen, without the knowledge of the company. What was the character of the office building? Was it so constructed and guarded as to make it a reasonably safe place in which to leave money packages unguarded? The answer is silent in this respect; and we cannot infer that it was an appropriate or safe building for such a purpose. Nor does it appear that the safe in which the money was deposited was such that persons of ordinary prudence would have risked in it such deposits. It is called a safe, yet, for anything shown by the answer, it may have been an insecure wooden box. The building was unguarded, and if, as alleged in the answer, the company was accustomed to leave the money packages received in the course of its business deposited there, it might reasonably be expected that thieves and burglars would closely scrutinize its condition, and common prudence would require that either the building or the safe should be such as would likely resist such an attack; but there is nothing in the answer showing that such was the character of either. So that if the facts alleged in the answer could be deemed sufficient to discharge the appellant from liability as a carrier, still it fails to show that it exercised reasonable care with the package as bailee. It follows that, in any view of the case, the answer is bad, and the demurrer to it was correctly sustained.

The judgment is affirmed, with costs.

LIABILITY OF RAILROAD COMPANY FOR BAGGAGE STOLEN WHILE IN ITS KEEPING: See *Warner v. Burlington & M. R. R. R.*, 92 Am. Dec. 389; *Blumenthal v. Brainerd*, 91 Id. 349.

EXPRESS COMPANY IS COMMON CARRIER WHEN: See *Southern Express Co. v. Newby*, 91 Am. Dec. 783.

DUTY OF COMMON CARRIER TO SAFELY STORE GOODS after they have reached their destination: See *Blumenthal v. Brainerd*, 91 Am. Dec. 349, note 363, where other cases are collected.

KAUFMAN v. DICKENSHEETS.

[80 INDIANA, 258.]

MONEY PAID IN SATISFACTION OF JUDGMENT, UPON COMPROMISE AND SETTLEMENT THEREOF, and of the subject of litigation, cannot be recovered back upon the reversal of the judgment by the supreme court.

APPEAL. The opinion states the case.

D. P. Baldwin, for the appellants.

By Court, FRAZER, J. This was a suit by the appellee against the appellants, to recover back money paid by the plaintiff to the defendants in satisfaction of a judgment held by the latter against the former, which was subsequently reversed by this court: See 28 Ind. 251, and also, S. C., 29 Id. 154. Proper issues being formed, it appeared by the evidence, without controversy, that the judgment was satisfied by a compromise in which the present appellants, in order to avoid further litigation, which was threatened by an appeal to this court, agreed to accept, and did accept, the note of a third person, due in ninety days, and the plaintiff agreed not to prosecute an appeal. In a word, there was a settlement and compromise, not only of the judgment, but of the subject of litigation. On this evidence there was a finding for the plaintiff. The case is here on the evidence.

Cannot a controversy be compromised as well after a judgment as before, and further litigation be thus avoided? And is not the arrangement just as valid? The question is too plain to justify discussion. It could only be by confounding questions altogether dissimilar, and applying language used in one connection to another subject entirely out of mind when that language was employed, that what we said in 29 Indiana could have misled anybody into the belief that money paid under the circumstances shown by this evidence could be recovered back.

The judgment is reversed, with costs; cause remanded for a new trial.

REVERSAL OF JUDGMENT, EFFECT OF: See *Tarleton v. Goldthwaite's Heirs*, 58 Am. Dec. 296, note 303, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Belton v. Smith*, 45 Ind. 291, to the point that payment of a judgment does not prevent the party so paying from afterwards taking an appeal.

ONSTATT v. REAM.

[30 INDIANA, 259.]

DESCRIPTION OF PROPERTY IN COMPLAINT IN REPLEVIN as "one white shoat of the value of fourteen dollars," is sufficiently explicit.

ACTION OF TRIAL COURT IN ADMITTING EVIDENCE WILL BE PRESUMED TO BE RIGHT, in the absence of any proof to the contrary.

WHERE EVIDENCE IS STRICTLY REBUTTING, it is not error for the court to refuse to allow the introduction of testimony in reply.

APPEAL. The opinion states the case.

J. U. Pettit, T. T. Weir, and H. S. Kelley, for the appellant.

By Court, GREGORY, J. This was an action of replevin commenced before a justice of the peace by Ream against Onstatt. The complaint averred that the plaintiff was the owner of and entitled to the possession of one "white shoat" of the value of fourteen dollars, of which the defendant had the possession, without right, which was unlawfully detained from him by the defendant, and that the same had not been taken by virtue of any execution or other writ against the plaintiff. The appellant moved in the court below to set aside the cause of action, because, as was alleged, the description of the property in controversy was not specific enough.

In *Pope v. Tillman*, 7 Taunt. 642, Gibbs, C. J., in speaking for the court. says: "I would not give judgment in this case, without stating that the court have not failed to advert to a case in the time of Lord Hardwicke, in which it was held that a count for taking a certain parcel of flax and a certain parcel of paper was good; and another case, in which the taking fourteen skimmers and ladles was held sufficient; but there was something to guide the party; here is nothing whatever to guide the party as to the nature of the goods taken."

The description in that case was "divers goods and chattels of the plaintiff." In the case at bar, the number and nature of the property and its value are stated. It is true that no

means is afforded by the description by which it could be distinguished from any other white shoat. Mr. Chitty says: "It must be confessed that as the description of goods or lands must in general be exceedingly similar, there is but little practical utility in this rule except as regards the description of a close by abutments": 1 Chitty's Pleading, 9th Am. from 6th Lond. ed., 377. The complaint was good, and the description of the property sufficiently definite.

There are objections taken to the admission of evidence, on the ground that it was not introduced in its proper order, and for irrelevancy; but the evidence given in the cause is not made a part of the record, and it is impossible, from the part of the testimony given, to determine whether it was rebutting or relevant. We must presume, in the absence of a contrary showing, that the court below did right. If the evidence given was strictly rebutting, then the court committed no error in refusing to allow the appellant to introduce testimony in reply thereto.

The controversy was over the identity of a hog. Each party claimed that the shoat embraced in the suit was his. In the complication of such a question, it is easy to see that the evidence admitted over the objection of the appellant was both relevant and rebutting. If so, then there is no error in the action of the court below.

The judgment is affirmed, with costs.

EVIDENCE IN CHIEF MAY BE INTRODUCED AFTER PARTIES HAVE RESTED, in the discretion of the court: *Donaldson v. Mississippi etc. R. R. Co.*, 87 Am. Dec. 391.

INSTRUCTIONS OF LOWER COURT WILL BE PRESUMED TO HAVE BEEN CORRECT, in the absence of any proof to the contrary: See *People v. King*, 87 Am. Dec. 95, note 101, where other cases are collected.

DESCRIPTION OF PROPERTY IN REPLEVIN, SUFFICIENCY OF: See *Pomeroy v. Trimmer*, 85 Am. Dec. 714, note 720, where other cases are collected.

LARGE v. KEEN'S CREEK DRAINING COMPANY.

[80 INDIANA, 253.]

COMPLAINT IN ACTION BY DRAINING COMPANY TO RECOVER ASSESSMENT need not state in terms the use for which the money is required, if it be evident from the whole complaint that it was required for the construction of the drains referred to in the directors' order for payment, set out in the complaint.

AFFIDAVIT THAT "FOREGOING ASSESSMENT IS CORRECT TO BEST OF OUR JUDGMENT," is a sufficient compliance with the requirements of a statute

requiring an affidavit that "the same is in all respects a true assessment to the best of their judgment and belief."

COMPLAINT IN ACTION BY DRAINING COMPANY TO ENFORCE PAYMENT OF ASSESSMENT against a person not a member of the corporation must describe the commencement, course, and terminus of the drain. But the fact that the company has not procured the right of way will not bar such action.

APPEAL. The opinion states the case.

S. A. Huff and D. Langdon, for the appellant.

By Court, ELLIOTT, J. Suit by the Keen's Creek Draining Company against Large, to enforce the payment of an assessment of benefits to certain lands. The company recovered, and Large appeals. The complaint was demurred to, because it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. This ruling is assigned for error. One objection urged to the complaint is, that it contains no allegation that it had become necessary that the association should order the payment of any portion of the assessment made by the appraisers. The company was organized for the construction of three several ditches or drains, and the complaint shows that the board of directors ordered the payment of "thirty per cent of the assessed value of benefits to the lands affected by the middle and north ditches." The complaint does not in terms state the use for which the money was required, but we think it evident from the whole complaint that it was required for the construction of the drains referred to in the order.

It is also objected to the complaint that the assessment returned by the appraisers, which is made a part of the complaint, was not verified as the statute requires. By the affidavit appended to the appraisal or assessment, the appraisers swear that "the foregoing appraisal is correct to the best of our judgment." The affidavit required by the statute is, that "the same is in all respects a true assessment, to the best of their judgment and belief": 1 G. & H. 304, sec. 12.

The affidavit made by the appraisers is not precisely in the language of the statute, but we think it sufficient. It is, in substance, the same.

Another objection is, that the complaint does not show that the proposed drains were ever located or established; nor does it describe their beginnings, courses, or termini. This objection is well taken.

Under the statute, the defendant, not being a member of the corporation, may deny that the proposed drain is of public utility, or of private benefit to him; and to enable him to make a proper issue on the subject, the complaint should at least give the commencement, course, and terminus of the drain: *West v. Bullskin Prairie Ditching Co.*, 19 Ind. 458. Here the complaint shows nothing in reference to them, except that they are in White County.

The seventh paragraph of the answer alleges that "the plaintiff appropriated his (defendant's) land for the construction of said ditch, but did not proceed in the manner required by law for the assessment of like damages in case of the construction of railroads, canals, and other similar works." Various provisions of the statute in reference to the appropriation of lands for the way of railroads and other public works, and the assessment of damages therefor, are then set out; and the paragraph concludes by averring that the plaintiff had not complied with any of the provisions of the statute so set out, wherefore it was not authorized to construct the proposed drains. The court at first overruled a demurrer to this paragraph; and the plaintiff replied that the drain was constructed through the defendant's land by his leave and license. A demurrer was filed to the reply, and the court, upon a reconsideration of the question, sustained the demurrer to that paragraph of the answer. This ruling is also complained of. Perhaps, as the complaint was defective, the demurrer to the answer should have been overruled, on the principle that a bad answer is sufficient to a bad complaint. But if the complaint had been good, the answer would clearly have been bad. The question of the right of way has no connection with that of enforcing the assessment. The company had the power to procure the right of way, either by purchase or by having the damages assessed and paying therefor, if, indeed, the question was not settled in the assessment of benefits. In any event, the fact that the right of way had not been procured would not bar the suit to compel the payment of the assessments.

The judgment is reversed, with costs, and the cause remanded, with leave to both parties to amend their pleadings.

WHERE MEMBER OF DRAINING COMPANY IS SURE FOR ASSESSMENT, his defense is limited to the amount of the assessment: *Liberty Township Draining Association v. Brumback*, 68 Ind. 94, citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *Crawford v. Prairie Creek Ditching Association*, 44 Ind. 363, to the point that the articles of a draining company should give the commencement, course, and terminus of the ditch proposed to be constructed.

PIEL v. BRAYER.

[30 INDIANA, 332.]

PROVISION OF INDIANA STATUTE REQUIRING THAT IN SALES OF LAND BY SHERIFF, "if the estate shall consist of several lots, tracts, and parcels, each shall be offered separately, and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same is not susceptible of division," applies to sales on foreclosure of mortgages as well as to sales on execution.

SALE OF SEVERAL DISTINCT TRACTS OR PARCELS OF LAND IN ONE BODY, made by the sheriff in violation of the statute, is void.

JUDGMENT CREDITOR PURCHASING AT SHERIFF'S SALE IS CHARGEABLE WITH NOTICE of all irregularities in the sale, and a purchaser from him is chargeable with notice of the contents of the record.

PRESUMPTION THAT SHERIFF DID HIS DUTY IN MAKING SALE DOES NOT PREVAIL, where it is apparent from the face of the record that the sale was made in violation of the statute.

WHERE WHOLE OF MORTGAGE DEBT IS DUE, IF LAND CONSIST OF SEPARATE PARCELS, it is the imperative duty of the sheriff to offer them separately, though the decree of foreclosure direct otherwise, and if it consist of a single tract susceptible of division without injury, and the sale of the whole is not necessary, he is required to divide it and offer at one time only so much of it as may be necessary to satisfy the judgment, interest, and costs.

APPEAL. This was a suit brought by Piel against Brayer, Schwier, and Brandt. The complaint alleged that the plaintiff executed to Brayer a note, and also a mortgage to secure it, of certain real estate, that he had tendered to Brayer an amount exceeding that due upon said note, and requested that the mortgage be satisfied of record, but that Brayer had refused to accept the money tendered, and to satisfy the mortgage; that Schwier and Brandt claim to hold a lien on the said real estate or some interest therein, the precise nature of which the plaintiff was unable to state. The money tendered was brought into court. Brayer answered separately in two paragraphs. In the first, he alleged that after-said note became due, he brought suit thereon and for a foreclosure of the mortgage; that a judgment was rendered against the plaintiff for the amount of the note and interest, and for a foreclosure of the mortgage, and an order was made for the sale of the mortgaged premises to satisfy the judgment; that the

sheriff, after giving due notice of the time and place of sale, sold the mortgaged premises at public auction to said Brayer, he being the highest bidder, and thereafter executed to him a deed for the same. The second paragraph alleged that in the decree, the premises were in one place incorrectly described, and prayed that the erroneous description might be corrected. Schwier and Brandt filed a joint answer, in which they alleged that Brayer, after he purchased the real estate at sheriff's sale, sold and conveyed it to them for a valuable consideration, which they paid. They prayed that their title, which they claimed to be a valid one, might be quieted, and that the plaintiff be enjoined from setting up any adverse claim to the property. The circuit court overruled demurrers interposed to these answers. The plaintiff filed replies to these answers, in which he claimed that the sale of the premises by the sheriff to Brayer was void, for the reasons stated in the opinion. Other facts necessary to an understanding of the case are stated in the opinion.

J. L. Ketcham, J. L. Mitchell, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for the appellant.

F. Rand, R. H. Hall, and A. Seidensticker, for the appellees.

By Court, ELLIOTT, J. The only questions presented in the case for our determination arise from the action of the court below in overruling the demurrers to the answers, and in sustaining those to the replies.

Are the facts set up in the answer sufficient to bar the action? Two objections are urged by the appellant to the validity of the sheriff's sale: 1. That the error in the description of the mortgaged premises in the decree of foreclosure is fatal to the sale made under it; and 2. That the real estate mortgaged consists of two separate and distinct tracts or parcels, as is shown by the description thereof in the mortgage and in the decree of foreclosure, and that the sheriff illegally offered and sold both parcels together, instead of selling each parcel separately.

The description of the property in the mortgage, and where it is correctly described in the decree of foreclosure, is as follows:—

"A certain parcel of land, situate in out-block number 72, of the donation lands of the city of Indianapolis, and inclosed in the following boundaries: commencing at a point on

the south line of said out-block number 72, 50 feet west of the south-east corner of said out-lot; thence running north to an alley for 158 feet, more or less; thence west for 44 feet 6 inches, along the south line of said alley; thence running south for 158 feet, more or less, to the south boundary of said out-block number 72; thence running east to the place of beginning. Also, another parcel of land, likewise situate in said out-block number 72, and inclosed in the following boundaries: commencing 55 feet west of the north-east boundary of said out-lot; thence running along the north line of said out-block 72 for 55 feet; thence south for 161 feet, more or less, to an alley; thence east along the line of said alley for 55 feet; thence north to the place of beginning."

The conclusion to which we have arrived upon the second proposition renders the examination of the first unnecessary. It appears by the sheriff's return to the order of sale that the whole of the mortgaged premises were offered and sold in one body at the same time to the defendant Brayer, the mortgagee, for the sum of three hundred dollars. The description of land in the mortgage shows that it consisted of two several lots, or parcels, which were separated by an alley. The statute provides that "if the estate shall consist of several lots, tracts, and parcels, each shall be offered separately; and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same shall not be susceptible of division": 2 G. & H. 249, sec. 466. This provision applies to sales on the foreclosure of a mortgage with like force as to sales on execution: 2 G. & H. 295, sec. 635. And it is well settled by numerous decisions of this court that if the sheriff, in violation of the statute, offer and sell several distinct tracts or parcels of land in one body, the sale is void: *Sherry v. Nick of the Woods*, 1 Ind. 575; *Reed v. Diven*, 7 Id. 189; *Banks v. Bales*, 16 Id. 423; *Tyler v. Wilkerson*, 27 Id. 450. Brayer, the judgment plaintiff, being the purchaser at sheriff's sale, is chargeable with notice of all irregularities in the sale. Nor do we think that Schwier and Brandt can claim to be innocent purchasers without notice that the sheriff exceeded his power in selling both parcels of the land in one body. They purchased from Brayer and derived their title through the mortgage, decree of foreclosure, and the sheriff's sale, and are chargeable with notice of the contents of the record, and are presumed to know the law. The description of the land in the mortgage and decree of foreclosure shows

that it consisted of two separate lots or parcels; and the sheriff's return to the order of sale, which is a part of the record, shows that both parcels were sold together in one body; they are therefore chargeable with notice of the fact that the sale was in violation of the statute; and as the fact is apparent on the face of the record through which they claim title, the rule that the sheriff is presumed to have done his duty in making the sale does not apply to the case: See *Doe v. Collins*, 1 Ind. 24.

The decree of foreclosure was rendered on default; and immediately following the erroneous description of the land ordered to be sold, in which it is described as lot number 144 in Noble's addition to the city of Indianapolis, occurs the following: "Said plaintiff having shown said real estate cannot be sold in parcels without injury, that the sheriff sell the land to the highest bidder," etc. It is insisted by the appellees that this provision of the decree was binding on the sheriff, and rendered the sale of both parcels of the land together a valid one. We do not think so.

The complaint contained no averment that the land could not be sold in parcels without injury. No such issue was tendered by the complaint. Nor did the law of the case authorize such an issue to be presented and determined by the court. Section 633 of the code provides that "in rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action." Where a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest, or installment of the principal, and there are other installments not due, the court is required to ascertain whether the property can be sold in parcels, for the purpose of determining the proper decree to be rendered in the case: 2 G. & H. 295, 296, secs. 637-639. But when the whole sum secured by the mortgage is due, no such question can be properly presented to the court: See *Harris v. Makepeace*, 13 Ind. 560; *Smith v. Pierce*, 15 Id. 210; *Benton v. Wood*, 17 Id. 260. If the land consists of separate parcels, it is the imperative duty of the sheriff, under the statute, to offer the parcels separately; and if it consists of a single tract or body, and is susceptible of division without injury, and the sale of the whole is not necessary to satisfy the execution, he is required to divide it, and to offer at one time only so much of it as may be necessary to satisfy the judgment, interest, and costs. We

think the answers were bad. If the decree of foreclosure is a valid one, still, as the sale by the sheriff is void, the appellant has the right to redeem, and it is shown by the complaint that the sum tendered was sufficient to satisfy the judgment, interest, and costs.

Judgment reversed, with costs, and the cause remanded, with directions to the circuit court to sustain the demurrers to the answers, and with leave to both parties to amend their pleadings.

SHERIFF'S SALE OF LAND EN MASSE INSTEAD OF IN SEPARATE PARCELS, VALIDITY OF: See *Bunker v. Rand*, 88 Am. Dec. 684, note 688, where other cases are collected. A sale of real estate as an entirety, when it is susceptible of division and sale in parcels sufficient to satisfy the execution, is voidable, and may be set aside: *Stotsenburg v. Same*, 75 Ind. 542; *Jones v. Kokomo Building Ass'n*, 77 Id. 344, both citing the principal case. If land offered for sale by the sheriff consists of separate parcels, it is his imperative duty to offer the parcels separately; and if it consists of a single tract, and is susceptible of division without injury, and the sale of the whole is not necessary, he must divide it, and offer at one time only so much of it as may be necessary to satisfy the judgment, interest, and costs: *Bardens v. Huber*, 45 Id. 238, also citing the principal case.

JUDGMENT CREDITOR IS CHARGEABLE WITH NOTICE OF IRREGULARITIES IN SALE BY SHERIFF: See *McLean County Bank v. Flagg*, 83 Am. Dec. 224. The purchaser at a foreclosure sale will be affected by all defects and irregularities of the sale that appear of record: *McKernan v. Neff*, 43 Ind. 506; *Stotsenburg v. Same*, 75 Id. 541, both citing the principal case.

THE PRINCIPAL CASE IS CITED to the point that in decreeing a sale of lands mortgaged, where the whole debt is due, the court is not required to first ascertain whether the parcels can be sold separately, in *Griffin v. Reis*, 68 Ind. 14, and in *Shorts v. Boyd*, 77 Id. 226. It is distinguished in *Weaver v. Gayer*, 59 Id. 199, and cited to a point not considered in *Hasselman v. Lowe*, 70 Id. 415.

TALBOTT v. GRACE.

[80 INDIANA, 389.]

TO SHOW DEDICATION, BY USER, OF LAND OF INDIVIDUAL, to a public use, it must have been a user by the public adverse to and exclusive of the use and enjoyment of the property by the proprietor, and not a mere use by the public under and in connection with its use by the owner in any manner desired by him.

RIGHT TO LAND BOATS AND TO LOAD AND UNLOAD FREIGHT, and thus encumber the land, cannot be acquired by the public by prescription or custom. Whoever claims it by long usage must prescribe in a *que estate*.

APPEAL. The opinion states the case.

A. C. Downey, for the appellants.

By Court, RAY, C. J. This was an action by appellants to recover for the use of the wharf, landing, and real estate of the appellants.

An answer was filed in several paragraphs, but as only the ruling upon the seventh is discussed by the appellants, we omit the others. This paragraph alleges that the ground in question is situated in the city of Rising Sun, and fronting on the Ohio River, and "had been used for more than twenty years before the loading of said boats, in complaint mentioned, by the public as a public landing and wharf in said city, for loading and unloading flat-boats, and for mooring and fastening said boats, and for the convenience of the public in navigating said river by flat-boats and other craft, all of which was well known to said defendants [plaintiffs] and those under whom they claim title, and with their assent." A demurrer was overruled to this paragraph.

This amounts to a claim of a dedication of the property to public use. The facts alleged, however, fail to show this. They do not show a dedication under such circumstances as to indicate an abandonment of the use exclusively to the community by the owners of the soil. To make a dedication it must have been a use by the public adverse and exclusive of the use and enjoyment of the property by the proprietors, and not a mere use by the public under and in connection with its use by the owners in any manner desired by them: *Irwin v. Dixon*, 9 How. 10.

But again, the dedication to the public claimed by this answer is not of a simple right of way or passage, but to land boats, and load and unload freight, and thus encumber the land. No such use can be acquired by the public by prescription or custom: *Post v. Pearsall*, 22 Wend. 425; *State v. Wilson*, 42 Me. 9. Such a right may, it is held in England, be acquired by the inhabitants of a local district, but cannot extend to the public. Whoever claims it by long usage must prescribe in a *que estate*: *Washburn on Easements*, p. 77, sec. 17; *Pearsall v. Post*, 20 Wend. 111.

The demurrer should have been sustained to the seventh paragraph of the answer.

The judgment is reversed, and the cause remanded for further proceedings.

DEDICATION, UPON WHAT FOUNDED: See *Morrison v. Marquardt*, 92 Am. Dec. 444, note 460, where other cases are collected; *San Francisco v. Calderwood*, 91 Id. 542, note 545.

PATE v. WRIGHT.

[30 INDIANA, 476.]

IF INSTRUCTIONS ARE NOT MODIFIED OR CHANGED BY ANY ORAL CHARGE, but go to the jury as they were written, there is no violation of the provision of the code requiring all instructions to be in writing, although the court repeated orally a part of one of the charges, and in reading another charge remarked orally that he had not intended to read so far as he had, and then re-read the charge as he intended to give it.

WHEN PARTIES ENTER INTO CONTRACT TO BE PERFORMED ON SUNDAY by common labor, the contract, as to performance on Sunday, is illegal and void.

DELIVERY OF FLOUR ON BOARD STEAMBOAT ON SUNDAY in order to avoid liability of delay in getting it to market, occasioned by danger of the closing of navigation, is not a work of necessity.

APPEAL. The opinion states the case.

H. W. Harrington and C. A. Korbly, for the appellant.

C. E. Walker, for the appellee.

By Court, GREGORY, J. Suit by the appellant against the appellees on a contract for the sale and delivery of three thousand barrels of flour. The complaint is in four paragraphs.

The first paragraph alleges the sale of three thousand barrels of Double Extra Montezuma Mills Family Flour to the plaintiff, by sample, for twenty-eight thousand eight hundred dollars, paid down; that the sample was of a "superior double-extra grade of flour," known in the market at New Orleans as Montezuma Double Extra Flour; that the defendants undertook and warranted the bulk of said three thousand barrels of flour to correspond with the sample; that the three thousand barrels of flour which they delivered were not of a grade and quality of flour corresponding with the sample, but were inferior, to wit, only superfine; that the same were worth three dollars per barrel less; whereby plaintiff suffered six thousand dollars damages.

The second paragraph alleges a purchase by the plaintiff of three thousand barrels of flour for twenty-eight thousand eight hundred dollars, paid down, which the defendants agreed to deliver on board the steamboat Peytona, at the wharf in the city of Madison, on the 15th of January, 1865; that the defendants knew plaintiff had contracted with said steamer, that she would arrive January 15, 1865, and that the flour was expressly purchased for shipment to and sale in

the New Orleans market; that the defendants did not deliver the three thousand barrels of flour, but only one thousand barrels, at the time agreed upon, and did not deliver the balance till long after; that the price of flour fell three dollars per barrel in the interim, which the plaintiff lost; that the plaintiff was compelled to pay the owners of the steamer Peytona three hundred dollars for not furnishing the freight, that is, the additional two thousand barrels not delivered.

The third paragraph is like the first and second; i. e., it alleges that the contract of warranty and delivery was one.

The fourth paragraph alleges that the plaintiff had purchased and paid twenty-eight thousand eight hundred dollars for three thousand barrels of flour, and that the defendants agreed to deliver the same at the wharf in the city of Madison in time to ship the same upon the steamboat Peytona, which the plaintiff had engaged to transport the flour; that the flour was purchased expressly for shipment upon said steamboat to New Orleans, but that the exact time of her arrival was unknown; that the defendants were fully informed of the objects of the purchase; that at the time of the purchase the weather was very cold, and there was great probability that navigation in the Ohio River would be closed with ice in a short time, and that the contract of delivery was made with reference to the state of the weather and stage of the river at that time; that said steamboat arrived at the wharf at Madison on the 15th day of January, 1865, and the plaintiff was ready and willing then and there to receive the flour, but the defendants refused to deliver two thousand barrels of the same; that after the departure of the Peytona the river closed with ice, and the plaintiff was unable to ship the balance of the flour till a long time afterward.

This paragraph contains the same allegations with regard to damages as the other paragraphs.

The defendants answered: 1. General denial; 2. As to the contract to deliver, that they had no notice of the arrival of the Peytona until the evening of January 14, 1865; and that the 15th (the next day) was Sunday, and they were not obliged to deliver the flour on that day; that they commenced to deliver the flour at midnight of the last-named day; and that the steamer Peytona left after receiving one thousand barrels; 3. That the defendants were commission merchants, and did not own the flour; that they accounted for the flour before notice.

The plaintiff replied by the general denial. Trial by jury; verdict for the defendants; motion for a new trial overruled, and judgment.

There are a number of questions argued by the appellant's counsel. As the verdict was for the defendants, all the questions on the evidence and the instructions of the court as to the measure of the damages become immaterial.

The judge was required by the appellant to give the charges to the jury in writing. The court repeated orally a part of one of the charges. In reading another charge, the judge remarked orally that he had not intended to read so far as he had, and then re-read the charge as he intended to give it. It is claimed that this is a violation of the provision of the code requiring all instructions to be in writing when it is required by either party. We hold that there was no error in the action of the court. The instructions were not modified or changed by any oral charge, but they went to the jury as they were written.

At the request of the appellees the court charged the jury as follows:—

“When parties enter into a contract to be performed on Sunday by the common labor of the party required to perform, and his employees, the contract as to performance on Sunday is illegal and void, and neither of them can maintain an action against the other arising out of said contract in respect to its non-performance on Sunday.”

The appellant asked the court to charge the jury as follows:—

“Work and labor on Sunday are prohibited by statute, except in cases of charity or necessity. If you find from the evidence that negotiations were being made between the plaintiff and defendants for the purchase of three thousand barrels of flour, for the purpose of shipping the same to New Orleans; and if you further find that in anticipation of the completion of said purchase the plaintiff engaged the steamer Peytona, when she should come to Madison, to take said flour on board and transport the same to New Orleans; and if you further find it was uncertain, at the time of engaging such boat, when she would arrive at Madison; and if you further find that on the fourteenth day of January, 1865, said plaintiff purchased and paid for said flour, and closed said negotiation, and that the said steamer Peytona had notified the parties that she would be at Madison on Sunday, the 15th of January, 1865;

and if you further find from the evidence that there was actual danger at the time of navigation closing soon, on account of the state of the weather; and if you further find that at the said time the water in the Ohio River was falling fast, and that a delay of the said boat over to and during Monday, the 16th of said month, would endanger her passage over the falls at Louisville, Kentucky, and leave her in danger of becoming ice-bound in said river; and if you find from the evidence that said steamer was too large to pass through the locks around said falls; and if you further find that on account of the foregoing matters (if the same be found by you) the defendants, at the time of said contract of sale above referred to, agreed to deliver said flour at the wharf, to said steamer at Madison, on Sunday, the fifteenth day of January, 1865,—then it is a question for you to decide whether such delivery of the flour was not a matter of necessity, under all the circumstances of the case. The necessity cannot arise for the mere convenience of a party; nor can it be founded on mere pretense; but must arise from the action of the elements, or upon some contingency not occurring in the ordinary transactions of business. And a necessity may be justified in the management, protection, or disposition of property, the value of which in market or otherwise may be greatly endangered by action and operation of the elements; and if in this case a real necessity for the delivery on that day existed, the defendants were bound to deliver the flour on that day, if they agreed to do so, as above stated.”

The court refused to give the charge, and the appellant excepted.

If it is illegal to make a contract on Sunday, it certainly is illegal to contract to perform one requiring common labor on that day. We think the true rule, and the reason for it, are recognized and stated in *Perkins v. Jones*, 26 Ind. 499.

If the vicissitudes of trade and speculation were allowed to fix the rule as to what are works of necessity, there could be no observance of the Sabbath. There are, as a general thing, dangers attending every enterprise, which may be avoided by expedition; but the Sabbath is not the day for common labor, although by such labor dangers may be avoided.

We think the court below put the case properly to the jury.

We have looked through the evidence, and think there was no testimony tending to prove a contract to deliver the flour on Sunday. In the absence of such a contract, it is clear that performance cannot be demanded on that day, on the ground

that a delay would subject the obligee to liability to pecuniary loss. The cases cited by the counsel for appellant do not meet this case.

In *Logan v. Mathews*, 6 Pa. St. 417, it was held that the visiting of his father by the defendant was a discharge of a filial duty, which nothing in the law hindered or forbade.

The ruling in *Commonwealth v. Knox*, 6 Mass. 76, was put on the ground that the defendant had contracted with the postmaster-general, under an act of Congress, to carry the mail on Sunday, and that by the federal constitution, laws made in pursuance thereof are declared to be supreme laws of the land, and to be binding on the judges in every state in the Union.

In *Flagg v. Inhabitants of Millbury*, 4 Cush. 243, it was held that when a defect in the highway is discovered on the Lord's day, which may endanger the limbs and the lives of travelers, it is not only morally fit and proper that it should be immediately repaired, but it is the imperative duty of the town, which is bound to keep the highway in repair, to cause it so to be done, or to adopt means to guard against the danger until it can be done.

In the case under consideration, liability of delay in getting the flour to market was the only thing involved. There was no filial duty to be performed; there was no supreme law of the land requiring and making the act lawful; life and limb were not endangered by the omission to do the work demanded. There was no moral fitness in requiring the appellees to do the work of delivery on the sabbath for any purpose involved in the transaction.

If the steamer in this case could lawfully demand to be freighted on the sabbath, we know of no legal reason that would prevent any boat on the Ohio River from making a like demand.

There was no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

CONTRACTS MADE ON SUNDAY, VALIDITY OF: See *Hazard v. Day*, 92 Am. Dec. 790, note 974, where other cases are collected. Contracts entered into on Sunday are void in Indiana: *Caslett v. Trustees of M. E. Church*, 62 Ind. 367; *Gilbert v. Vachon*, 69 Id. 374; *Parker v. Pitts*, 73 Id. 599; *Shaw v. Williams*, 87 Id. 162; *City of Evansville v. Morris*, 87 Id. 272, all citing the principal case.

EVANS v. BROWNE.

[80 INDIANA, 514.]

COURTS OF INDIANA MUST TAKE JUDICIAL NOTICE of what is and what is not the public statutory law of the state.

WHEN STATUTE IS AUTHENTICATED BY SIGNATURES OF PRESIDING OFFICERS of the two houses of the legislature, the courts will not search further to ascertain whether or not such facts existed as gave constitutional warrant to those officers to thus authenticate the act as having received legislative sanction in such manner as to give it the force of law.

APPEAL. The appellee, plaintiff below, in his complaint alleged that by an act of the general assembly of the state of Indiana, passed at the special session thereof in the year 1869, entitled "An act making specific appropriations for the year 1869 and 1870," it was, among other things, enacted: "That Thomas M. Browne be allowed the sum of fifteen hundred dollars, for services as attorney to the Morgan Raid Commission, by appointment from Governor Baker, as provided for in the concurrent resolutions of the general assembly of the state of Indiana, for the year 1867"; that the plaintiff demanded of the defendant that he draw a warrant, as auditor of state, in favor of the plaintiff, on the treasurer of state of the state of Indiana, for said sum due to him by said act; that the defendant refused and refuses to draw said warrant. The prayer was for a writ of mandate to compel the defendant to draw said warrant. The defendant in his answer admitted said allowance to the plaintiff by said act, but charged that said act did not become a law of the land, binding and justifying the defendant in acting under the same, for the reason that said bill, after its passage in the house of representatives, was reported to the senate for its action, and was by the senate amended in many important particulars; that the bill thus amended was returned to the house, and before the amendments made by the senate were considered and acted on by the house, forty-two members of said house of representatives resigned their offices as members of said house, by presenting and delivering to the governor of the state their resignations in writing, which were filed with the governor on the 13th of May, 1869, thereby then and there destroying the capacity and power of said house to legislate and transact business, reducing the number of its members below sixty-seven, its constitutional quorum; that on the 14th of May, 1869, said house, without said constitutional quorum, concurred in the several amendments of the senate, and finally

passed said bill; that thereafter, on the same day, the governor officially communicated to the house information of the fact that forty-two members of said house had, on the 13th of May, 1869, so resigned; and hence, that said bill did not become a law. The plaintiff demurred to this answer, but his demurrer was overruled. The plaintiff then replied that there was a quorum of the members of the house present at the time of the concurrence by the house in the senate amendments to said bill, as appeared from the journal of the proceedings of the house. A copy of the journal of said house for the 13th and 14th of May, 1869, was made a part of the reply. The defendant demurred to the reply, on the ground of insufficiency, but the court overruled the demurrer. The cause was, by agreement, tried by the court. The court found for the plaintiff, and ordered that the writ issue against the defendant. The defendant moved for a new trial, which being denied, he filed his bill of exceptions. In addition to the evidence contained in the bill of exceptions, a certified copy of a message of the governor was, by agreement, made part of the evidence and attached to the record. By this message the governor communicated to the house that forty-two members thereof (naming them) presented and delivered to him their resignations as such members, on the 13th of May, 1869. And it was agreed that this message was transmitted by the governor, through the speaker, to the house, on the 14th of May, 1869, after the house had concurred in the amendments of the senate to the specific appropriation bill. Prefixed to the enrolled act filed in the office of the secretary of state was the following statement:—

“House bill No. 311, hereto attached, entitled ‘An act making specific appropriations for the year 1869 and 1870,’ having been presented to me on the fifteenth day of May, 1869, and the final adjournment of the general assembly having taken place on the seventeenth day of May, 1869, and said act not having been approved and signed by me, and not having been filed in the office of the secretary of state, with my objections thereto, within five days after said adjournment, said act therefore took effect, under the constitution, without executive approval, on the twenty-second day of May, 1869; and now, in filing it in the office of the secretary of state, I deem it my duty to accompany it with a statement of facts as to the manner of its passage. The bill, having regularly passed the house, was reported to the senate, and was

amended in many particulars by the senate, by the addition of many new sections making additional appropriations. Thus amended, the bill was returned to the house, and before the amendments so made by the senate were considered by the house, forty-two members of the house resigned their offices as members of the house of representatives, by presenting and delivering to the governor their resignations in writing. These resignations were made on the thirteenth day of May, 1869, and afterwards, on the fourteenth day of May, 1869, the house of representatives concurred in the said amendments of the senate to said bill; and on the same day, but not until after this concurrence had taken place, the governor officially communicated to the house of representatives information of the fact that the said forty-two representatives had, on the said thirteenth day of May, 1869, so resigned.

(Signed) "CONRAD BAKER, Governor.

"EXECUTIVE CHAMBER, INDIANAPOLIS, May 22, 1869."

After the signatures of the presiding officers of the legislature upon the enrolled act, was the following indorsement: "This bill was presented to me on the fifteenth day of May, 1869, and the final adjournment of the general assembly took place on the seventeenth day of the same month; and the bill, not having been acted upon within five days thereafter, took effect, without executive approval, on the twenty-second day of May, 1869. (Signed) Conrad Baker."

J. W. Gordon, W. Morrow, and N. Trusler, for the appellant.

T. M. Browne, S. E. Perkins, J. S. Harvey, N. Van Horn, J. E. McDonald, A. L. Roache. and E. M. McDonald, for the appellee.

By Court, FRAZER, J. The following questions only are necessary to be considered in order to reach a decision of this cause, viz.: 1. Must the courts of this state take judicial knowledge of what is and what is not the public statutory law of the state? 2. When a statute is authenticated by the signatures of the presiding officers of the two houses, will the courts search further to ascertain whether such facts existed as gave constitutional warrant to those officers to thus authenticate the act as having received legislative sanction in such manner as to give it the force of law?

1. There are some cases in our reports in which it has been conceded that an issue may be made upon the record by plead-

ing, upon the determination of which, upon evidence adduced, the courts are to be governed in deciding what is a statute of the state; but a very full consideration of the question on the present occasion, aided by able counsel, has resulted in the clearest conviction that the doctrine has no support whatever in sound principle. Can it be tolerated that a court must be informed what the law is by the verdict of a jury, as would be in criminal cases?—that in one case it shall be compelled, by the finding of an issue, to determine that the legislature has enacted thus and so, and in the very next case to be tried, where the same issue is not made by the pleadings, or the same evidence has not been produced, or another jury has found differently, the very same court must determine that there is no such statute? It is a maxim old as the common law, and a rule of necessity, that the court takes judicial notice of public law; it is presumed to know what it is, and it is its duty to know it. Even the private citizen must know it at his peril; and his responsibilities and duties are based upon the conclusive presumption that he has this knowledge. Must the court employ the machinery of a trial to give information to the judge, which, as a citizen, he must, at the risk, possibly, of his liberty or life, have possessed before he was called to the bench? It is a most mischievous departure from plain and wise maxims derived from that system of laws which forms the basis of and constitutes largely the body of ours; and while it would have disturbed the harmony and order of judicial administration in England, it would in this state, in view of the provisions of our constitution, which contains specific directions for the mode of authenticating statutes by high legislative officers, acting under solemn oath, and requires a journal of legislative proceedings to be kept and published, be entirely destitute of any conceivable utility. The enrolled acts, with their authentication, are deposited in a public office, and are there accessible to everybody. The journals are public documents at least, if not records, and are also within reach of all. Whatever, affecting the question of a quorum, such as the resignation of members, may have been lodged with the governor, may also be inspected. In short, every fact upon which, in any view, depends the question whether a document purporting to be a statute has, by legislative action, been invested with the force of law, is, in its nature, a public fact which may be easily ascertained; it is a fact of public current history, and there is therefore no necessity for bring-

ing it to judicial knowledge by the finding of an issue. It may be true that, ordinarily, the courts would not, unless the matter was questioned, make any investigations beyond the statute-book itself; but this argument is not forcible; for the industry and research of counsel can as well put the court upon inquiry by an argument and a reference to the sources of information as by pleading upon the record. To us it seems an astonishing fact in the history of jurisprudence that there should, in this country especially, have ever existed a conflict of decisions upon the subject, or that it should have been seriously presented as a question for judicial determination.

In *Skinner v. Deming*, 2 Ind. 558 [54 Am. Dec. 463], this question was virtually decided the other way, on the authority of *Purdy v. People*, 4 Hill, 384. In *Coleman v. Dobbins*, 8 Ind. 156, there is a *dictum* to the same effect, though it is expressly declared that the point is not decided definitely. The judgment, however, implies such a decision, and cannot be supported otherwise than by this implication. These cases, and some others in our reports which concede the same point, have embarrassed us; but we cannot concur in them.

It is believed that this anomalous and essentially mischievous doctrine had its origin in New York. After the subject had there become enveloped in uncertainty by a multitude of curious opinions delivered in *Purdy v. People*, *supra*, — a case from the report of which it is almost impossible to tell what was held by the majority to be law upon any subject, but in which the actual judgment of reversal in favor of the plaintiff in error (who disputed the validity of the passage of an act, and yet did not raise the question by pleading), precludes the possibility of such a ruling, — the court of appeals, finally, in *People v. Supervisors etc.*, 8 N. Y. 317, without giving any reason or citing any authority to sustain it, did distinctly lay down the doctrine, in a case where it was entirely unnecessary to have considered the question at all. The opinion in *Coleman v. Dobbins*, *supra*, cites *Speer v. Plank Road Co.*, 22 Pa. St. 376. That case is not to the effect supposed. *Miller v. State*, 3 Ohio St. 475, decides nothing whatever upon the subject. It is probable, however, that this New York doctrine (now exploded in that state) has passed into other states, and been adopted without much examination. Indeed, whenever it is admitted that there is no certain and conclusive method by which the legislature is to make known its action, and the question, What is the statute law? is held to require search in

all quarters for facts to answer it, it becomes quite plausible to say that these facts should be ascertained by an issue. When we come to consider the second question which we have proposed to ourselves, it will be seen that our view of it does not, however, involve us in that entanglement.

2. Immemorial usage, having the force of law, and therefore incumbent as a duty upon the presiding officer of a legislative body, requires that he should not proceed with business in the absence of a quorum. In case of doubt, he may count the members present, and thus ascertain the fact. A call of the house may be had in order to determine it. The very fact that the body proceeds with legislative business must therefore be, to all the world, very strong evidence of the presence of a quorum; for if a quorum were not present, then a duty imposed by parliamentary law upon the presiding officer has not been performed; and it is not becoming that one co-ordinate department of the government should thus condemn another. But this is not all. Of necessity, the body must, in the first instance, judge for itself as to the presence of a quorum. No other tribunal can so well ascertain the fact as itself; and it would seem scarcely fit, therefore, that the courts should be at liberty to enter into that investigation. It may be possible that the question of the presence of a quorum is a legislative, and not a judicial, question, and that the courts, in a case like this, cannot inquire into it without passing beyond their jurisdiction as limited by the constitution, and thereby invading the field which belongs exclusively to the legislature. The form of our state government was intended to make these two departments co-equal, but separate and independent of each other, each having distinct functions to perform, and wholly beyond the control of the other. But these remarks are not intended as a decision of the point suggested, nor as an intimation of what would be its determination in a case where a solution of it might be necessary. The doubt is expressed as to our power to enter upon the question; because it should, unless the matter is otherwise clear, have some little weight in the consideration of the inquiry whether we can look behind the official authentication made by the proper officers of the two houses. Courts should be very careful not to invade the authority of the legislature. Nor should anxiety to maintain the constitution, laudable as that must ever be esteemed, lessen their caution in that particular; for if they overstep the authority which belongs to them, and as-

sume that which pertains to the legislature, they violate the very constitution which they thereby seek to preserve and maintain. No person charged with official duties under the judicial department shall exercise any of the functions of the legislative department: Art. 3, sec. 1.

The question in hand may now be approached more closely, and, indeed, its importance only, and not at all any difficulties attending it, will justify the foregoing preliminary observations.

The constitution provides that a majority of all the members elected to each house shall be necessary to pass every bill, and that all bills "so passed shall be signed by the presiding officers of the respective houses": Art. 4, sec. 25. The vote on the passage of a bill cannot, of course, be lawfully taken in the absence of a quorum. What, then, was the purpose in requiring this attestation by the presiding officers? Was it intended as an idle form? It is not fair so to assume. What possible object, then, was sought to be accomplished by it, unless it was to furnish evidence that the paper thus attested had been by the proper processes of each house clothed with the force of law,—evidence upon the enrolled act itself which should be taken as authentication and prove itself upon inspection? The act, the validity of which is here controverted, is thus attested by sworn public officers, in the form required by the constitution. It is important, certainly, that the question whether the enactment of a statute is valid shall be made capable of ready and correct solution, and that the evidence thereof shall be preserved, and that it shall not depend upon doubtful or conflicting evidence. When all are bound to know the law, they should have the means of knowledge, and not merely reasons for conjecture, uncertainty, and doubt. It has been conceded in the argument for the appellant that the attestation in this case is probably *prima facie* sufficient to show a statute regularly and properly enacted, but contended that this only is the force of the authentication required by the constitution. The houses must keep journals of their proceedings, which, however, are not, like the enrollment, required to be either attested or preserved (1 G. & H. 563); and it is argued that there is an appeal to these from the official attestation of the presiding officers, and to the archives in the executive department. Would the journals be as satisfactory to the mind? Such journals, it is notorious, are, and must be, made in haste, in the confusion of business, and are often inaccurate. Their

reading is frequently omitted from day to day, so that those errors go without correction. They do not show the nature of the bill as introduced, but merely the amendments which have been proposed to it. They are not required to contain anything by which it could be even identified and its passage traced. They are not required to show whether or not a quorum is present. Journals such as these had been kept by the legislature of this state from the beginning. The convention which framed the present constitution must be supposed to have had knowledge of these things. Can the opinion be entertained that they meant that the journals, necessarily imperfect and incomplete memorials, should, as evidence, override the solemn attestation of the passage of a bill, which they were so careful to require, by the presiding officers? Or can it be supposed that they meant that two records should be looked to as concurrent proofs of the same fact, and yet made no provision for guidance when these should happen to be in conflict? By what reason or analogy can we sustain ourselves in holding that the journal should override the signatures upon the enrolled act? Surely not because it is, in the nature of things, more likely to speak the whole truth upon the question in hand. Surely not because it is a rule that the truth of any other record in the world, attested as the law requires to make it proof, may be successfully combatted by something else, not made by law superior to the attestation of the proper officer.

This exact question has received the consideration of other American courts, who have thoughtfully and with careful steps reached the conclusion that the authentication of the presiding officers of the legislature is conclusive evidence of the proper enactment of a law, and that they cannot look elsewhere to falsify it: *State ex rel. etc. v. Young*, 5 Am. Law Reg., N. S., 679 (Sup. Ct. N. J.); *Pacific R. R. v. Governor*, 23 Mo. 353 [66 Am. Dec. 673]; *Duncombe v. Prindle*, 12 Iowa, 1; *Eld v. Gorham*, 20 Conn. 8; *Fouke v. Fleming*, 13 Md. 392; *People v. Supervisors of Chenango*, 8 N. Y. 317; *People v. Devlin*, 33 Id. 269.

Some other New York cases have been cited in the argument as in conflict with the view which we have already expressed. We do not so deem them, but if they were so intended, the recent one of *People v. Devlin*, *supra*, shows that that doctrine is no longer maintained in that state.

It is believed that the English cases are, without exception, to the same effect,—that the roll, called here the enrolled

act, imports absolute verity, and therefore cannot be questioned. It is argued, however, that the English cases are not applicable here, for the reason that Parliament did not keep, nor was it required to keep, a journal of legislative proceedings. This argument is plausible, but it is, nevertheless, unsound. It assumes that the journal is in its nature equal or superior, as an instrument of evidence, to the authenticated enrollment. But we have seen that in its nature it is not so, and that it is not admissible to infer therefrom that it was intended as sufficient to overthrow the latter. If we are correct in this, then the English cases upon the subject are entitled to great consideration.

But it is argued that if the authenticated roll is conclusive upon the courts, then less than a quorum of each house may, by the aid of corrupt presiding officers, impose laws upon the state in defiance of the inhibition of the constitution. It must be admitted that the consequence stated would be possible. Public authority and political power must, of necessity, be confided to officers, who, being human, may violate the trusts reposed in them. This perhaps cannot be avoided absolutely. But it applies also to all human agencies. It is not fit that the judiciary should claim for itself a purity beyond others; nor has it been able at all times with truth to say that its high places have not been disgraced. The framers of our government have not constituted it with faculties to supervise co-ordinate departments and correct or prevent abuses of their authority. It cannot authenticate a statute; that power does not belong to it; nor can it keep the legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. It cannot, we think, look beyond that authentication, because of the constitution itself. If it may, then for the same reason it may go beyond the journal, when that is impeached; and so the validity of legislation may be made to depend upon the memory of witnesses, and no man can, in fact, know the law which he is bound to obey. Such consequences would be a large price to pay for immunity from the possible abuse of authority by the high officers who are, as we think, charged with the duty of certifying to the public the fact that a statute has been enacted by competent houses. Human governments must repose confidence in officers. It may be abused, and there may be no remedy.

Nor is there any great force in the argument which seems

to be regarded as of weight by some American courts, that some important provisions of the constitution would be a dead letter if inquiry may not be made by the courts beyond the rolls. This argument overlooks the fact that legislators are sworn to support the constitution, or else it assumes that they will willfully violate that oath. It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the judiciary only will be faithful to its obligations.

It is finally suggested in argument that the indorsement upon the roll by the governor, and the statement by him attached thereto, constitute a veto of the bill. This idea is wholly inadmissible, and indeed is expressly contradicted by those instruments. Certain facts are stated, but they are not made the basis of objection to the bill becoming a law. Both instruments must be looked to to ascertain the intention of the executive.

Having reached the conclusion that the courts must for themselves ascertain what is the public law of the state, it follows that there was much unnecessary pleading in the case, and that the questions made by the demurrers were wholly immaterial, except simply the question, Was the complaint sufficient? and having determined that the courts cannot look beyond the enrolled act and its authentication, it results that the complaint was good in law, and that there is no available error in the record.

The case being thus disposed of without reaching the question,—much and ably discussed in the argument,—what constitutes a quorum under our state constitution? there is no necessity, nor indeed propriety, in any consideration of that subject by this court upon the present occasion.

The judgment is affirmed, with costs.

JUDICIAL NOTICE: See *McConnell v. Kibbe*, 92 Am. Dec. 93; *Wells v. Jackson Iron Mfg. Co.*, 90 Id. 575; *Lanfear v. Mestier*, 89 Id. 658, note 663, where this subject is fully discussed. The courts of Indiana take judicial notice of what is and what is not the public statutory law of the state: *Turbeville v. State*, 42 Ind. 491; *Stultz v. State*, 65 Id. 498, both citing the principal case.

ENROLLED ACT OF LEGISLATURE PROPERLY AUTHENTICATED AND DULY DEPOSITED with the secretary of state is conclusive upon courts, who will not look beyond it to ascertain the legislative will: *Sherman v. Story*, 89 Am. Dec. 93, note 115, where other cases are collected; *Van Dorn v. Bodley*, 38 Ind. 422; *Edger v. Board of Commissioners of Randolph Co.*, 70 Id. 338, both citing the principal case.

CASES
IN THE
SUPREME COURT
OF
IOWA.

CLEMMER AND DUNN v. COOPER.

[24 IOWA, 185.]

CERTIFIED COPY OF TRANSCRIPT FROM DOCKET OF JUSTICE OF PEACE is properly admitted in evidence in an action on a foreign judgment rendered on appeal from the justice's court, where the transcript is embraced in the certified copy of the record of the court wherein the judgment sued upon was rendered and forms a part of its entire record.

RECORD OF FOREIGN JUDGMENT WHICH IS PROVED TO BE ENTITLED TO FAITH AND CREDIT OF JUDGMENT, by the law, practice, and usage of the state from whence the record came, must be given the same force and effect in an action on the judgment in a sister state; and on appeal it will be presumed that such proof was made in the court below where there is nothing to show that the record contains all the evidence introduced at the trial.

ACTION on a foreign judgment, the record of which contained merely a statement of the various proceedings in the cause, and that on a date named verdict was rendered for the plaintiffs, and concluded: "Same day judgment on the verdict, by J. F. Temple, prothonotary; sum due ascertained to be sixty dollars and seventy-two cents (\$60.72), interest from January 7, 1867." The answer specifically denied the material allegations of the petition. Judgment for the plaintiffs, and defendant appeals.

L. G. Palmer, for the appellant.

T. W. and John S. Woolson, for the appellees.

By Court, **COLE, J.** The errors assigned by the appellant's counsel are substantially two: 1. That the court erred in ad-

mitting in evidence the certified copy of the transcript from the docket of the justice of the peace who first tried the cause in Greene County, Pennsylvania, from whence the judgment record comes. This transcript was embraced in the certified copy of the record and proceedings in the court of common pleas, wherein the judgment sued upon is claimed to have been rendered. It being a part of the entire record of the court by which the judgment itself was rendered, and being duly authenticated as such, there was no error in admitting it. 2. That the court erred in rendering judgment for the plaintiffs upon the evidence introduced in the cause, for that the copy of the pretended judgment is in law no judgment of a court, but simply a memorandum by a "pro." The attorneys for the respective parties signed an agreement in the form of, and to be taken as, a bill of exceptions. The agreement commenced as follows: "Be it remembered that, in the trial of this cause in the district court, the facts are and were as disclosed in the transcript of judgment from Pennsylvania. [Here follows the entire transcript, including judgment as set out in statement, the return by the justice of the proceedings before him, etc., and the authentication, etc.] The defendant objected to its introduction in evidence under the pleadings, and excepted to judgment rendered by the district court at the time, and this agreement is made of record by agreement in lieu of a bill of exceptions."

There is nothing in the record of this case to show that we have all the evidence which was introduced before the district court. We need not determine whether the judgment sued upon is sufficiently formal and authoritative as a judgment, on its face, to authorize a recovery upon it. For it was held in *Taylor v. Runyan*, 3 Iowa, 474, S. C., 9 Id. 522, that if it was proved on the trial that, by the law, practice, and usage of the state from whence the transcript came, it was entitled to the faith and credit of a judgment, we should feel bound to give it the same force and effect: See also *Greasons v. Davis*, 9 Iowa, 219. Now, beyond controversy, the judgment in this case is more formal than in the case just quoted from. If such evidence was introduced in the court below,—and we have nothing to show us that it was not,—then the judgment was unquestionably correct. Whether it would be correct without such evidence we should not determine, for such question is not before us. Error must be affirmatively shown. Every reasonable presumption in favor of the correctness of the action

of the court below may be indulged in by an appellate court to support the judgment appealed from.

Affirmed.

JUDGMENT OF SISTER STATE IS ENTITLED TO SAME FORCE AND EFFECT in every other state as it has in the state where it is rendered: *Swift v. Stark*, 88 Am. Dec. 463, and note 465; *Petersen v. Chemical Bank*, 88 Id. 298, and note 308; *Barner v. Gibbs*, 86 Id. 210, and note 213. The principal case is cited to the point that a judgment of another state, where the jurisdiction properly appears upon the record, is entitled to the same faith and credit as it receives in the state where rendered: *Melhop v. Doane*, 31 Iowa, 401.

WALTERS v. STEAMBOAT MOLLIE DOZIER.

[24 IOWA, 192.]

JURISDICTION CONFERRED UPON FEDERAL COURTS IN CIVIL CAUSES OF ADMIRALTY AND MARITIME JURISDICTION by the ninth section of the judiciary act of 1789 is exclusive.

IOWA STATUTE, SO FAR AS IT UNDERTAKES TO GIVE REMEDY IN REM AGAINST BOAT OR VESSEL for a cause of action of admiralty cognizance, is in conflict with the judiciary act of Congress of 1789 conferring exclusive admiralty jurisdiction upon the United States district courts.

TO DETERMINE QUESTION OF ADMIRALTY JURISDICTION IN REM, regard must be had to the character of the waters, of the boat or vessel, and of the contract or tort which forms the subject of the action.

ADMIRALTY JURISDICTION, UNDER NINTH SECTION OF JUDICIARY ACT OF 1789, extends to the public navigable rivers of the United States, and to all public waters capable of being navigated by maritime or commercial vessels propelled by wind or steam.

ADMIRALTY TAKES COGNIZANCE OF MARITIME TORTS.

SUIT AGAINST BOAT BY NAME, AND SEIZURE OF IT, IS NOT COMMON-LAW REMEDY, and therefore not one of the remedies saved to suitors by the ninth section of the judiciary act of 1789.

COLLISION BETWEEN STEAMBOAT AND FLAT-BOAT ON NAVIGABLE RIVER is of admiralty cognizance, where the remedy pursued is *in rem* against the boat by name, and not against its owners.

WHERE STEAMBOAT NAVIGATING MISSOURI RIVER AS COMMON CARRIER of passengers and freight tortiously ran so near a flat-boat loaded with lumber and navigating the river as to cause it to sink, a suit *in rem* against the steamboat was of admiralty cognizance, and the Iowa statute could not give the state courts jurisdiction.

OBJECTION TO JURISDICTION OF STATE COURT, IN CASE OF ADMIRALTY COGNIZANCE, may be raised for the first time in the appellate court.

ACTION against the Steamboat Mollie Dozier, as sole defendant, brought under the Iowa statute: Revision, c. 148. The petition alleged that on the sixth day of September, 1866, plaintiff had, on the Missouri River, a flat-boat of the value of three hundred dollars, loaded with fifty thousand feet of lum-

ber of the value of fifteen hundred dollars; that the defendant, negligently, and with the intent of injuring plaintiff's boat, ran unnecessarily near it, and at an unnecessary and unusual rate of speed; and by reason of defendant's conduct, plaintiff's boat was broken to pieces and destroyed, and the cargo of lumber wholly lost, whereby plaintiff was damaged in the sum of eighteen hundred dollars, for which he prayed judgment, and a warrant to seize and detain the steamboat according to law. Under the statute, a warrant to seize the steamboat issued, summons was served, and the boat seized. Verdict and judgment for the plaintiff for fourteen hundred dollars, and appeal by the defendant.

W. L. Joy, and Withrow and Wright, for the appellant.

Polk, Hubbell, and Barcroft, for the appellee.

By Court, DILLON, C. J. The leading question on this appeal is, whether the state courts have jurisdiction of the cause of action set forth in the petition. Defendant insists that the action, being *in rem*, brought against the steamboat by name, and seeking to condemn and sell the boat to satisfy the damages which she caused to the plaintiff, is within the admiralty jurisdiction of the federal courts, and that such jurisdiction is exclusive. This position, under the recent decisions of the supreme court of the United States, below referred to, is well taken.

The constitution declares that the judicial power of the United States "shall extend to all cases of admiralty and maritime jurisdiction": Art. 3, sec. 2.

The ninth section of the judiciary act of 1789, in establishing the jurisdiction of the several federal courts, provides that the district courts of the United States "shall also have exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction, including seizures under laws of impost, navigation, or trade of the United States, when the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden." A clause of this (ninth) section "saves to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it."

In the recent cases of *Moses Taylor*, 4 Wall. 411, and *Ad Hine v. Trevor*, 4 Id. 555, S. C., 6 Am. Law Reg., N. S., 586, S. C., 1 West. Jur. 231, it is decided by the supreme court of

the United States that it is competent for Congress, under the constitutional provision above quoted, to make the jurisdiction of the federal courts exclusive in admiralty cases. Having declared this proposition, that court further decided that the jurisdiction conferred upon the federal courts by the ninth section of the act of 1789, in civil causes of admiralty and maritime jurisdiction, is, in express terms, made exclusive, and that this exclusion extends to the state courts.

The point decided in the case of *Ad Hine v. Trevor*, *supra*, is, that a collision between steamboats on the interior public navigable rivers of the United States, though the collision occurs above tide-water, and *infra corpus comitatus*, makes a case of admiralty cognizance, when the remedy is by a direct proceeding against the steamboat by name, and not against the owners.

This decision overturns our state boat law (Revision, c. 148), so far as that law undertakes to give a remedy *in rem* against the boat or vessel for a cause of action of admiralty cognizance; that is, a cause of action essentially maritime in its nature, and properly falling within the limits of the jurisdiction of the federal courts in admiralty.

It may be remarked that our statute (Revision, c. 148) embraces cases not cognizable in admiralty, and to this extent the statute is not in conflict with the constitutional legislation of Congress conferring exclusive admiralty jurisdiction on the district courts of the United States. The exact limits of the exclusive admiralty jurisdiction of the federal courts are, in many respects, yet to be judicially established.

The question now recurs, Is the case made by the petition one in which a remedy *in rem* is given in admiralty? In other words, could the plaintiff have libeled the defendant for the same injury in the admiralty courts of the United States? If these questions ought to be answered in the affirmative, then it follows that the jurisdiction of the admiralty court would be exclusive.

To determine the question of admiralty jurisdiction *in rem*, regard must be had to the character of the waters, to the character of the boat or vessel, and to the character of the contract or tort which forms the subject of the action. In the case at bar the injury complained of was committed on the Missouri River.

The admiralty jurisdiction under the ninth section of the judiciary act extends to the public navigable rivers of the

United States,—to all public waters capable of being navigated by maritime or commercial vessels propelled by wind or steam: *Genesee Chief*, 12 How. 443; *Fretz v. Bull*, 12 Id. 466; *Waring v. Clark*, 5 Id. 441; *Magnolia*, 20 Id. 296; *Nelson v. Leland*, 22 Id. 48; *Ad Hine v. Trevor*, *supra*.

If it is essential under the act of 1789 to the jurisdiction in admiralty of the federal courts that the stream shall be navigable from the sea by vessels of ten or more tons burden (a point not necessary to discuss), the Missouri River is such a stream.

The boat—defendant in this case—is a steam-vessel navigating the river Missouri, as a common carrier of passengers and freight. That the admiralty jurisdiction extends to vessels or boats of this character admits of no doubt. If the present action had been brought against the flat-boat, the question might be different. As to the character of the vessels or craft to which the jurisdiction in admiralty extends, see *Salsbury*, Olcott, 71; *McCormick v. Ives*, 1 Abb. Adm. 418; *Many v. Noyes*, 5 Hill, 34; *Leddo v. Hughes*, 15 Ill. 41; *Thackeray v. Farmer*, Gilp. 524; S. C., 1 West. Jur. 243, and valuable note of the learned annotator; see also Abbott's Net. Dig., tit. Admiralty, where the cases in the federal courts respecting the nature and extent of admiralty jurisdiction are conveniently arranged and accurately digested; *Galena etc. Packet Co. v. Rock Island Bridge*, just decided by the supreme court of the United States.

That admiralty will take cognizance of maritime torts is also clear: *Fretz v. Bull*, *Nelson v. Leland*, and *Ad Hine v. Trevor*, *supra*, were cases of collision on the Mississippi River, the first two between flat-boats and steamboats, and the latter between two steamboats, in both cases above tide-water.

If the defendant had actually collided with the flat-boat, the former might be libeled in admiralty. The present injury (assuming as we must the truth of the petition in determining the jurisdictional question) is the same in character and governed by the same principle: See *Mozey*, 1 Abb. Adm. 73. There is but one point of possible difference between this case and that of *Ad Hine v. Trevor*, *supra*. In that case, the injury sued for occurred on the Mississippi River. Here it occurred on the Missouri. There the injury complained of was a tort. So it is here. In that case, it was another steamboat that was injured by the tortious act of the *Ad Hine*. In this case, it was a flat-boat laden with lumber, and actu-

ally navigating the river, that was injured by the defendant. The owner of this flat-boat was engaged in lawful commerce on the river. He was conveying lumber from one place to another. While thus engaged in the navigation of the stream, the defendant, at the time similarly engaged, negligently and willfully injures the plaintiff's boat. We have referred more particularly to *Ad Hine v. Trevor, supra*, because the question of admiralty jurisdiction was there most fully examined. In principle this case is identical with that.

The present case, as to the jurisdictional question, is precisely like *Fretz v. Bull* and *Nelson v. Leland*, above cited, in both of which it was held by the supreme court of the United States that a case of collision between a steamboat and a flat-boat, on inland navigable rivers, was of admiralty cognizance: See also *The S. B. Southern Belle*, Newb. Adm. 461; S. C. affirmed on appeal to supreme court of the United States, 13 How. 584.

These authorities settle the question, that, for the injury set forth in the petition, the plaintiff might have libeled the boat defendant in admiralty. If this might have been done, then the same authorities also settle the question that the plaintiff cannot pursue a remedy against the boat *in rem*, under the state laws and in the state courts. For *Ad Hine v. Trevor, supra*, expressly rules that the remedy adopted by the plaintiff in the present case, viz., a suit against the boat by name and a seizure of it, is not a common-law remedy, and therefore not one of the remedies saved to suitors by the ninth section of the judiciary act.

If the foregoing views are correct, it follows that the district court of Woodbury County had no jurisdiction of the case made by the petition. If it be conceded that the jurisdiction of that court was not questioned below, the objection is not waived; for the case is of such a nature that the court would not thereby acquire jurisdiction; and the objection may be taken in any stage of the proceeding.

It erred in assuming jurisdiction, and rendering judgment against the defendant: *Elder v. Dwight Mfg. Co.*, 4 Gray, 201; *Smith v. Dubuque Co.*, 1 Iowa, 494; *Chapman v. Morgan*, 2 G. Greene, 374; *Low v. Rice*, 8 Johns. 409; *Davis v. Packard*, 7 Pet. 281; *Dudley v. Mayhew*, 3 N. Y. 9.

Whether a judgment rendered in such a case would be void, if not appealed from, we need not determine. The judgment

below is reversed, and an order will be entered in this court dismissing the case.

Reversed.

STATE COURTS HAVE NO JURISDICTION OF ACTION AGAINST VESSEL BY NAME, as this is an exercise of admiralty jurisdiction which is conferred exclusively upon the United States district court: *Griswold v. Steamboat Otter*, 93 Am. Dec. 239; *Phegley v. Steamboat David Tatum*, 84 Id. 57, and note 61. The subject of actions in state courts against vessels is treated at length in the note to *Keating v. Spink*, 62 Id. 234-246.

THE PRINCIPAL CASE IS CITED to the point that statutes which are partly in conflict with the constitution will be held void no further than as to those parts which are unconstitutional; and provisions which are within the limits of legislative authority will be enforced: *City of Keokuk v. Keokuk etc. Packet Co.*, 45 Iowa, 211; to the point that consent will not confer jurisdiction when the court has not by law jurisdiction of the subject-matter: *Danforth v. Thompson*, 34 Id. 245; *Cerro Gordo County v. Wright County*, 59 Id. 486; and to the point that the right to object to an erroneous ruling in sustaining a demurrer to a petition is waived by pleading over; but where the question raised is a jurisdictional one, relating to the subject-matter, this rule does not preclude the party pleading over from again raising it on appeal to the supreme court: *Roland v. Brock*, 29 Id. 285.

WARRINGTON v. POLLARD.

[24 IOWA, 281.]

TO SAVE COSTS, DEFENDANT MUST KEEP HIS TENDER GOOD BY ACTUALLY PRODUCING the money, and depositing it in court. And it is too late where the amount tendered before suit is not deposited in court until after the trial has begun, and after the accrual of costs not embraced in the amount tendered.

ACTION for work and labor before a justice of the peace.

The defense was a denial and set-off, with a plea of tender of fifty dollars in money before suit brought, with the averment that defendant is "still ready and willing to pay any amount plaintiff is justly entitled to, and for this purpose deposits that amount here in court." But the fifty dollars was not deposited with the justice until after trial commenced, and after the defendant was partly through with his testimony. The justice gave judgment for the defendant. The plaintiff appealed; and on the trial in the district court, the jury gave a verdict for the plaintiff on his demand, and for the defendant on his set-off, leaving a balance of fifty dollars for the plaintiff; and also found specially that the defendant had tendered the plaintiff fifty dollars before the commencement of the suit. Judgment was rendered against the defendant

for fifty dollars and costs, and the defendant excepted and appealed.

J. E. Neal, Phillips, Gatch, and Phillips, for the appellant.

Stone, Ayres, and Curtis, for the appellee.

By Court, DILLON, C. J. The only material question in the case is, whether the court below erred in taxing the defendant with the costs. The sum tendered was just equal to the sum recovered. Hence the amount tendered was sufficient to save the defendant from costs, provided the tender was kept good. It is settled by the prior decisions of this court that, notwithstanding the statute, it is essential to keep the tender good by actually producing the money, and depositing it in court, where it may at any time be accepted and received by the creditor: *Johnson v. Twigg*, 4 G. Greene, 97; majority opinion followed: *Freeman v. Fleming*, 5 Iowa, 460; *Mohn v. Stoner*, 11 Id. 30; S. C., 14 Id. 115, affirming *Johnson v. Twigg*, *supra*, Baldwin, C. J., remarking "that it was not wise to overrule it, as it had been the settled practice of the state for ten years."

In principle, *Mohn v. Stoner*, as reported in 14 Iowa, 115, covers this case. The money in that case was tendered before suit commenced, but not brought into court until the trial, several terms having elapsed. Held, that the tender had not been kept good.

In this case, the amount tendered was not produced or deposited in court until after the trial had begun, and the plaintiff had finished his testimony, and the defendant had partly produced his. This was too late to save the defendant from liability for costs.

If the amount had been paid into court, as alleged in the answer, plaintiff might have accepted it, and thus the fees of the jurors and of his witnesses been saved.

The tender was not good until the money was in court. At the time the money was paid in, costs had been made, not embraced in the amount tendered, and which accrued after the filing of the answer.

To hold the tender good would make the plaintiff liable for these costs, though they might never have been made had the money tendered been deposited in court concurrently with the filing of the answer. Whether, were the question an original and undecided one, we would reach the same conclusion as to the effect of the statute, or as to the effect of the non-produc-

tion of the money in court, we need not stop to discuss. This is one of those cases where certainty in the rule, heretofore adopted, is the paramount consideration. We adhere to the former rulings of the court on this subject, and this adherence results in affirming the judgment below. *

Affirmed.

TENDER BY BRINGING MONEY INTO COURT: See this topic treated in the note to *Moynahan v. Moore*, 77 Am. Dec. 482, 483, 485, 486. Tender, readiness to pay, and payment, are affirmative pleas, and the burden of proof is cast upon the defendant: *North Pennsylvania R. R. Co. v. Adams*, 93 Id. 677. The principal case is cited to the point that to make a plea of tender good, the money must be brought into court: *Shugart v. Pattee*, 37 Iowa, 425; and if costs have accrued at the time of the tender made, they must be included: *Martin v. Whister*, 62 Id. 417.

CITY OF PELLA v. SCHOLTE.

[24 Iowa, 283.]

WORDS "GARDEN SQUARE" MARKED ON BLOCK IN TOWN PLAT do not necessarily imply a dedication of the block. The words are equivocal, and resort must be had to extraneous circumstances to discover what was intended thereby; and they were in this case insufficient to establish a dedication, especially after a lapse of eighteen years from the period of the supposed dedication, during all of which time the defendant's acts and conduct were wholly inconsistent with a dedication to public use.

ONUS IS ON PUBLIC TO ESTABLISH DEDICATION.

STATUTE OF LIMITATIONS RUNS AGAINST MUNICIPAL OR PUBLIC CORPORATIONS, though not against the state or sovereignty.

RIGHT OF CITY TO MAINTAIN ACTION FOR RECOVERY OF SQUARE THEREIN, on the ground that the owner had dedicated it to the city, is barred where the owner openly, visibly, and to the knowledge of the city, held possession of the square, claiming title, for the statutory period of limitation after the city's cause of action accrued.

MERE ENTRY NOT FOLLOWED BY POSSESSION WILL NOT SUSPEND RUNNING OF STATUTE OF LIMITATIONS at common law, where the possession of the occupant was originally lawful, and he subsequently refuses to surrender it to one who afterwards acquired the right of property, for this amounts to a forfeiture.

FORCEFUL ENTRY BY CITY UPON SQUARE CLAIMED TO HAVE BEEN DEDICATED is not equivalent to an action, and will not suspend the running of the statute of limitations against the city, where the original owner immediately obtained an injunction restraining the city from disturbing his possession, which he immediately resumed.

PETITION in equity by the city of Pella against Scholte and his wife, who was his voluntary grantee. The petition averred that Scholte, who was the original owner and proprietor of the land forming the site of the city of Pella, had laid out the city,

and on the plat thereof a certain block of ground had been designated as "Garden Square," and dedicated to the public; and that the defendants deny the right of the public, and obstruct the public in the enjoyment of the square. And the petition prayed, that the city might have its right to the control of the square judicially established. The defendants answered denying the alleged dedication, and setting up the statute of limitations. Upon the hearing the petition was dismissed, and the plaintiff appeals. In other respects the opinion states the case.

Seever and Williams, for the appellant.

H. P. Scholte and Z. T. Fisher, for the appellees.

By Court, DILLON, C. J. This appeal presents two leading questions: 1. Was the block of ground marked on the recorded plat of Pella "Garden Square" dedicated by the defendant, Scholte, to the public? 2. If so, is the plaintiff's right barred by the statute of limitations?

With reference to both of these questions it is urged that the circumstances relating to the founding and laying out of Pella are important as evincive of the intention of Mr. Scholte in platting the square in controversy, and as illustrative of his subsequent possession and control of it.

A brief allusion to these circumstances is therefore needful. Pella was originally settled by emigrants, coming thither in a body or colony from Holland. This body or community was organized in the Netherlands. At Utrecht, in that kingdom, on the twenty-fifth day of December, 1846, the society took definite shape, and adopted on that day written "regulations for emigration to the United States of America." These are in the nature of a constitution for the body, and clearly indicate the purpose of the organization. It was to be composed of persons desirous of coming to the United States. It was largely religious in its origin. Conspicuously displayed in publications by the defendant, Scholte, and in maps of the place, is the motto: *In Deo spes nostra et refugium*.

Immoral persons were not allowed to become members. Recollecting the eighty years religious struggle between the fatherland and Spain,—a struggle made memorable by the transcendent abilities of William the Silent, and the exhaustless patriotism and fortitude of the people; by the despotism of Charles V.; by the unyielding obstinacy of Philip II.; by

the almost unexampled cruelties of Alva; by the great disparity of resources in the contending parties; by the memorable example it gives that no movement is so deep as that which proceeds from the religious nature of man, and of the wonderful power of a people animated by the sublime instinct of preserving at once country and religion, — recollecting this national epic, but as yet not sufficiently familiar with the great truth (so well known to the people of the land to which they proposed to go) that religious concord is the child only of universal and indiscriminating religious freedom, they provided in terms that no Roman Catholic should become a member of the society. The object was not to form a communist organization. The “regulations” clearly show this. The society was to be governed by a board, consisting of the president, vice-president, secretary, and four counselors.

Each member was to bear his own expenses, and to pay for his own land. The board was to make contracts for and superintend the passage. Money to buy the amount of land each desired was to be paid to the board, and when the place for the settlement was selected, and the land purchased, the latter was to be divided, each to get the amount for which he paid.

In a central position 160 acres were to be retained for school purposes, with provision that smaller parcels might be sold to artisans and tradesmen, that is, to those not wishing to engage in farming. Births and marriages were to be registered. The president was the chief executive officer. He was to sign all documents, and all proceedings of the society were to be recorded.

The defendant, Scholte, was the president. In 1847, Marion County, in this state, was selected as the place of settlement. And in the same year a survey was made of eight blocks of a town called Pella. This was located upon land purchased by the defendant. The legal title was in him. There is no evidence, at least no sufficient evidence in this record, showing that the defendant held the title to this land in trust for the community. And it may here be observed that it is uncertain, from the evidence before us, how long or to what extent the “regulations” were applied to the affairs of the community. It does appear that the defendant sold and conveyed the lots, and received the money, and it does not appear that his individual right to the lots, or the proceeds thereof, was ever questioned.

It must be taken, then, that the defendant was the individual proprietor of the land on which Pella was laid off, and of the lots after it was platted.

And here we notice some of the more material circumstances relied on by the plaintiff to establish the dedication. It is claimed that, in the Holland language, "garden square" means a public square. It is not satisfactorily shown that either the word "garden" or the word "square" has any peculiar meaning in the Dutch language.

The phrase "garden square" does not express or necessarily imply a dedication to the public. The implication from the expression is rather the other way. There seems, however, to be nothing conclusive, either for or against the dedication, in the words used. The words are equivocal. Resort must be had to extraneous circumstances to discover what was intended by this language. And here it may be observed that the public claim the property on the ground that the original owner has given it for public use. The *onus* is on the public to show that the owner has thus given it.

It has been stated above that in 1847 a survey of eight blocks was made. It is claimed by the city that in the center of these eight blocks was a piece of ground, the same as that now known as "Garden Square," which was marked on the plat, made by the surveyor, Hall, as "Public Square." Defendant denies that Hall made any plat, and claims that his survey was only preliminary, in order to ascertain about where the streets would run when a final survey came to be made, so that some necessary improvements could be made.

During the next year (1848) the second survey was made by another surveyor, and there was laid off and platted eighty-seven blocks. The plat was duly acknowledged by Scholte, and recorded. Across the block in controversy are the words "garden square," and the block is numbered 26.

There are also on the plat two blocks called respectively "East Market Square" and "West Market Square." None of these are subdivided into lots. The two market squares have always been recognized as belonging to the public. Immediately north of the block marked "Garden Square" is block 17, in size equal to two blocks. This, also, is not subdivided into lots nor intersected by the East and West street. This double block, it is clearly shown, was laid out in this shape by the defendant, as the site of his future residence, and is the one on which he soon thereafter built

and now resides. The testimony also tends to show that this block 17 was, in the survey of 1847, two distinct blocks with street between. Upon the whole, we think the weight of testimony is, that there was a plat made of the Hall survey of 1847. But this survey was not intended to be, and was not, final. If a plat was made, it was never acknowledged or recorded. Nor does it appear that any conveyances were made under it, though a few lots were sold, but conveyed according to the final survey made in 1848.

If reliance can be placed on the unassisted memory of a majority of the witnesses testifying to this point, we would have to conclude that the block of ground in controversy was, in the first survey, marked "Public Square." But the fact is by no means clear that there was a plat, and particularly, that it contained the words "public square."

Defendant claims that as the ground lay in front of the site of his future residence, he caused the same to be marked "Garden Square," to indicate a place in the nature of a private park, which he intended to ornament with trees, shrubbery, walks, etc., for his own pleasure and convenience, denying or allowing the public access thereto, and such rights therein, as he might see proper. And it must be admitted that, from the beginning, the defendant's acts and conduct with respect to this ground, in fencing, planting, and improving it at his own expense, go very far to fortify this claim. That the defendant recognized a difference in meaning between "Public Square" and "Garden Square," is shown by the fact that in laying out New Amsterdam, at the same time Pella was laid out, defendant caused one of the blocks to be marked "Public Square."

Other facts are relied on by the plaintiff to establish the alleged dedication. One is, that the defendant, as an inducement to persons to buy lots, declared to them that Garden Square belonged to the public.

Only one or two persons testify to such declarations, and when it is remembered that the testimony relates to oral declarations made many years before; that such declarations are denied on oath by the defendant; that it is shown that the defendant, at or about the same time, frequently denied that it was public property,—we cannot say that the imputed declarations of the defendant that the square was public are satisfactorily established.

It does very clearly appear that a higher price was asked

for lots around the square than in other portions of the plat.

If it be admitted that this is not satisfactorily accounted for by the central situation of the lots, by the fact that the defendant, by his theory, intended to ornament the square, still it is only a circumstance, but not a conclusive one, to prove the alleged dedication.

Without going more minutely into the discussion of this branch of the case, we may state our general conclusion to be this: if this dispute had arisen shortly after the platting and declarations relied on to show the dedication, we are of opinion that the same evidence now before us would justify us in holding that the defendant had ceded his right to the public, or at least was estopped to set it up against the vendee of the lots around it.

But as this dispute arises after the lapse of about eighteen years from the period of the supposed dedication, during all of which time the defendant's acts and conduct have been wholly inconsistent with a dedication to public use, we must say that we have great doubt whether the plaintiff has satisfactorily shown that the defendant, in platting the square, intended to dedicate it, or that, by his subsequent acts and declarations, he is estopped to deny a dedication.

At the time of the supposed dedication (1847 and 1848), the defendant resided with his family, in a log house, upon the square in question. He continued to reside there until his new house was finished upon the double block just north of it. After he left the house on the square, he rented it to others for some years, and as long as it continued to stand. A portion of the time a school was kept there, and occasionally public meetings were held in it and on the square; but this was generally, if not always, by the special and express permission of the defendant. Besides this, the defendant has had the square fenced all the time; at first by a rail fence, and afterward by a paling fence of a substantial character, constructed at his own expense. In this fence there were two gates, in general kept locked by the defendant. Defendant also made, from time to time, plantations of trees in and around the square, and also laid out walks therein.

For some years he cultivated the ground for ordinary horticultural purposes, and afterward seeded it to grass and used it as a pasture, and let it to others for this purpose for hire.

Again, defendant has returned the same for taxation as pri-

vate property every year since 1847, and every year has paid the county and state taxes thereon. The city of Pella was incorporated August 3, 1855. Every year since then, the defendant has returned it to the city assessors, among his other property, for municipal taxation. Every year but one the council has stricken it off as not being taxable. One year, it seems, the defendant did pay city taxes on it.

So it is evident that the city authorities have known from the first that the defendant asserted his claim to the square, and denied that of the city. And so it is manifest from the evidence, indeed the fact is scarcely denied, that, since 1847, the defendant has been in the actual possession and exercised the sole control of the square, claiming to do so in his own right, and in hostility to the public.

To evade the significant force of this undeniable fact, the city claims that this possession and control by the defendant was not in his own right, but as the president of the emigrant association, before referred to.

This is open to two answers: the evidence in the record does not satisfy us (as before stated) that the association had any right in or to the square, the town lots, or land on which these were laid out; hence it cannot be predicated of defendant's possession that it was as the trustee of the society.

Again, if it were conceded that the defendant's possession was that of the society (a voluntary association) so that it is to be considered as if the society were in the possession and control of the square, it is not shown how the city corporation succeeded, in this respect, to the rights of the members of the society. Of course, if the square were once dedicated to the public, the subsequently organized municipal corporation would have the right to control it the same as it would the streets or other public ground.

Under these circumstances, the question recurs whether (assuming that there had been a dedication of the square in 1847 or 1848) the defendant may insist upon the bar of the statute of limitations. It will be assumed that the statute would not begin to run in favor of the defendant until the town or city was incorporated, charged with the duty of watching, and possessed of the power of asserting and protecting, the rights of the intended donee. The city was organized August 5, 1855. This suit, to assert the right of the city to the square, was not brought until February 26, 1866, — more than ten years after the incorporation of the plaintiff. To

actions of this character, though brought in equity, the ten years' limitation applies directly or by analogy. This is not disputed by counsel: Revision, sec. 2740; *Keyes v. Tait*, 19 Iowa, 123; 3 Kent's Com. 575, 576; Adams's Ejectment (App.), 4th ed., 601, and authorities cited; *Newman v. De Lorimer*, 19 Iowa, 244; *Johnson v. Hopkins*, 19 Id. 49; *Robinson v. Lake*, 14 Id. 421.

Rights of this character may be acquired by the public by the requisite user: *Onstott v. Murray*, 22 Iowa, 457.

And it would seem reasonable that the public, with knowledge of its rights, and of the adverse claim by an individual, may lose those rights in a similar manner.

Of course it is well understood that statutes of limitations do not constructively apply to the state or sovereignty. But the principle has not, so far as we know, been extended to municipal or public corporations. On the contrary, it has been expressly held that these corporations are within the statute of limitations the same as natural persons: *Cincinnati v. First Pr. Church*, 8 Ohio, 298 [32 Am. Dec. 718], 1838, followed in *Cincinnati v. Evans*, 5 Ohio St. 594, 1855. See also *Rowan v. Portland*, 8 B. Mon. 250, 258; *North Hempstead v. Hempstead*, 2 Wend. 109, 137; *Denton v. Jackson*, 2 Johns. Ch. 320, 338.

Whether there may not be some limitation on this general doctrine, arising out of the want of knowledge of the public corporation or its officers of its rights, or of the adverse right sought to be asserted against it, we need not stop to examine. For in this case, the right claimed by the defendant has been openly asserted by him, and fully known to the city ever since its first organization.

The present case is, therefore, a proper one for the application of the statute, or the principle of repose upon which it rests. This leaves but one question to be noticed with reference to the application of the statute.

Defendant, as before stated, was in the open and visible possession of the square, claiming title to it at the time the city was incorporated. He continued in such possession, without any interruption, until the thirty-first day of March, 1865 (slightly less than ten years from the date of the plaintiff's corporate organization), when the city of Pella passed an ordinance "concerning the Garden Square," directing the marshal of the city "to take immediate possession of the square," "to remove such portion of the fence and hedge around said square,

and to train, cut down, or destroy such trees thereon as the mayor might direct." The marshal proceeded to execute the ordinance, whereupon the present defendants (Scholte and wife) brought their bill to enjoin the officer, and obtained an injunction, and at once resumed possession. Thus the defendant, with the exception of the forcible interruption by the marshal for a few days, continued to remain in possession until this suit was brought by the city in February, 1866.

It is claimed that the statute ceased to run when the marshal of the city undertook to execute the ordinance of March 31, 1865. It seems to us that the proposition is not well founded. The marshal's possession was forcible, and against the will of the defendant in actual possession.

Suppose I am in actual possession of a lot, claiming title, and that the adverse claimant shall come every day and deny my right, or temporarily but tortiously dispossess me by force, but still I retain my possession for the ten years required by statute, will not the statute operate in my favor, if in the mean time no "action be brought"? Under our statute (section 2740), which speaks of actions, and not of actions or entries, it seems clear that it will; and this view applied to this case disposes against the plaintiff of the point now under consideration: See 2 Greenl. Ev., sec. 545; *Hubert v. Trinity Church*, 24 Wend. 587; *Cunningham v. Patton*, 6 Pa. St. 355; *Doe v. Eslava*, 11 Ala. 1028.

It is proper, however, to add that, in our opinion, the evidence shows no such "interruption" of the adverse possession of the defendant, by the forcible act of the marshal in removing the fence and cutting down some trees, as will suspend the operation of the statute.

If the defendant had abandoned the possession, or if the entry by the city had been peaceable, or if it had been followed up by continuous possession, a different question would be presented. But the entry was forcible, upon the actual prior possession of the defendant, who disputed the city's right, obtained at once an injunction against the city disturbing him in the possession, which he immediately resumed. Such an entry, if the act of the marshal amounts to an entry, will not avail to defeat the defense of adversary possession.

At common law, and under the statute of 21 Jac. I., c. 16, the rightful owner of land might, in certain cases of ouster or privation, redress the injury or avoid the effect of the statute of limitations, by the "exercise of the extrajudicial and sum-

mary remedy of a formal and peaceable entry" thereon. In certain cases, however, the common law did not allow the right of the possessor to be interrupted or defeated by the mere act of entry by the claimant, but drove the claimant to his action. The cases in which entry is and in which it is not allowed are stated by 3 Bla. Com. 167-179; see also *Altamas v. Campbell*, 9 Watts, 28 [34 Am. Dec. 494]; *Holtzapple v. Phillibauer*, 4 Wash. C. C. 357.

In this state, we have now no statute relating to or regulating the right of entry: See formerly, Laws 1839, p. 326, secs. 6, 7.

Whether a mere entry by the owner, not followed by possession upon the actual possession of the adverse claimant, would have in this state its common-law properties, and would from the time of such entry defeat the statute of limitations, we need not stop particularly to inquire.

For, assuming the common law to apply, the possession of Scholte of the square in question was originally lawful, he being in actual possession as owner when he laid it out; and, as against the city, his possession became wrongful only when the city was organized, and he refused to surrender the possession to the city, which would amount to or be in the nature of a deforcement in the common-law meaning of the word. In such case, the remedy by mere entry alone was not given by the common law: 3 Bla. Com. 167-179.

Again, we have a statute to protect persons in the actual prior possession of lands from being forcibly disturbed: Revision, sec. 3952.

Defendant was in the actual possession of the square. The city authorities entered upon this possession, not "in a peaceable and easy manner, but with force and strong hand." If what the city did dispossessed the defendant, it was done forcibly, and under such circumstances as would enable him to have the benefit of the statute giving a summary remedy for forcible entry.

Such an entry, wrongful in its nature, is not rewarded by ascribing to it the attributes, and giving to it the effect, of a lawful entry: 3 Bla. Com. 174, 179. Besides, the remedy by entry, to which the city resorted, did not become consummate; for the city did not gain and keep any actual possession, it being immediately, or as soon as it was possible to procure the writ, enjoined from taking possession of the square or disturbing the defendant herein in his possession. If a bare entry, not followed by possession thereunder, can, in this state,

be regarded in any case as an equivalent for an action, we agree with the learned Chief Justice Gibson in *Altamas v. Campbell*, 9 Watts, 28, 30 [34 Am. Dec. 494], that the doctrines relating to it are purely technical, and not to be favored. For its effect is, as he justly observes, "subversive of the purpose of the statute of limitations, which is to compel parties to settle their controversies while the evidence of their rights is attainable, and to put a reasonable period to the evils of a contested ownership. By repeated entries within the period of the statute of limitations, a contest might be kept on foot interminably, or until the occupant's proofs had perished with those who could establish them; when, having been deterred from cultivating and improving the land, he might at last be left defenseless by the lapse of time, which, instead of having fortified his title, as it ought, would be found to have destroyed it. Such an entry, we are compelled by the terms of the statute to say, is as effective as an action; but we are at liberty, and policy requires us, to hold the plaintiff to strict proof of a formal observance of the ceremony."

If the city had succeeded in getting peaceable possession of the square, it might have avoided the effect of the statute of limitations. The injunction suit did not prevent the city from bringing an action to try the respective rights of the parties. In conclusion, it is deemed proper to add that the foregoing views in relation to the statute of limitations and adverse possession are to be taken in connection with the special facts of this case, and would not necessarily apply to a case where the dedication was general, unlimited, and for the whole public, and not restricted, or for the primary benefit of the contemplated municipality, and hence under its special control and guardianship; or to a case where the public corporation was ignorant of its rights or those of the public, or that these had been encroached upon, or that a hostile right was being asserted against it; or to a case where the action was by the state, or its public officer, to assert the public rights, and not by the municipal corporation to assert its rights.

The decree below is affirmed.

INTENT TO DEDICATE TO PUBLIC USE MUST BE CLEAR, and the acts or circumstances relied on to establish such intention should be unequivocal and convincing: *Morrison v. Marquardt*, 92 Am. Dec. 444, and note 460; *Lee v. Lake*, 90 Id. 220, and note 224. As to dedication by town plats, see *Weisbrod v. Chicago etc. R'y Co.*, 86 Id. 743, and note 750. The principal case is

cited to the point that the designation of a parcel of land on a town plat as "Market Square" may not *per se* show a dedication, but if the attendant circumstances tend to show a dedication, it will be sufficient: *Scott v. City of Des Moines*, 64 Iowa, 444.

RE-ENTRY TO TERMINATE ADVERSE POSSESSION: See this subject treated in the note to *Peabody v. Hewett*, 83 Am. Dec. 497-500.

COUNTIES AND CITIES ARE NOT EXEMPT from the operation of the statute of limitations: *County of St. Charles v. Powell*, 66 Am. Dec. 637, and note 639; and see *Cincinnati v. First Presbyterian Church*, 32 Id. 718, 721, as to its application to a dedication to public use. But the statute does not run against the sovereignty: *Smith's Adm'rs v. De La Garza*, 65 Id. 147, and note 152. In *County of Des Moines v. Harker*, 34 Iowa, 87, it is held that the statute of limitations does not run against the state; that the statute providing that the statutory limitation shall be applicable to all actions brought by or against all bodies corporate and politic does not change the rule, for the words "bodies corporate and politic" do not include the state; and that further, if it were doubtful whether the state was intended to be included by the words used, the doubt should be resolved in favor of the state; and the principal case is cited. It is also cited to the effect that the statute does not run against the state, in *Davies v. Huebner*, 45 Id. 577.

THOMAS v. KENNEDY.

[24 IOWA, 397.]

POSSESSION OF LAND WHICH IS OSTENSIBLY AS MUCH IN HUSBAND AS WIFE will not impart notice of the equitable title of the wife to a purchaser of the land at execution sale under a judgment against the husband, who held the legal title at the time.

WHERE EQUITY WOULD COMPEL GRANTOR TO CORRECT MISTAKE IN DESCRIPTION OF LAND intended to be conveyed, he may do voluntarily what might thus be enforced.

LIEN OF JUDGMENT ATTACHES, NOT TO NAKED LEGAL TITLE, but to the judgment debtor's actual interest in the land; and if he has nothing but the naked legal title, no lien attaches.

WIFE IS ENTITLED TO HAVE TITLE QUIETED IN HER IN ACTION TO QUIET TITLE brought by the purchaser at execution sale against her and her husband, where the husband conveyed by misdescription to his wife's father, who afterwards conveyed voluntarily to her by the same description; and afterwards a judgment was entered against the husband in whom the naked legal title still remained, but he, before execution sale of the land, executed a deed to his wife, reciting therein that it was made to correct the mistakes in the two former deeds; and the heirs of the first grantee are not necessary parties for this purpose.

PURCHASER OF LAND AT EXECUTION SALE IS BOUND TO TAKE NOTICE of the condition of the record title up to the time of the sale; and if at that time an instrument is properly indexed, he is affected with constructive notice of all it contains.

PETITION at law, in which the plaintiff claimed, as against Kennedy and Angeline, his wife, the defendants, title to and

possession of the southwest quarter of the northwest quarter, section 12, township 81, range 2, in Clinton County, under an execution sale of the land under a transcript of a judgment in favor of E. D. Selden against Kennedy, recovered in Scott County, and filed in Clinton County June 16, 1861. Under this judgment, execution was issued, and levied July 16, 1861, and the land was sold thereunder August 23, 1861, to E. M. Selden, to whom the sheriff executed a deed, and who afterwards conveyed to the plaintiff. The defendants in their answer admit that the title to the land in controversy was once in the husband, Kennedy, but allege that on February 23, 1856, Kennedy sold it to his father-in-law, Everett Drake, for the consideration of two hundred dollars, and on the same day the husband and wife executed a deed to Drake, which described the property by mistake as the southeast instead of the southwest quarter of the northwest quarter, etc., and which was duly recorded; that on the 5th of February, 1858, Drake and wife conveyed the land to their daughter, Angeline, wife of Kennedy, and co-defendant herein, "in consideration of natural love and affection, and the further sum of five dollars," and the same misdescription was contained in this deed; that Drake died in 1860, leaving three children; that on the 27th of July, 1861, Kennedy, for the consideration of two hundred dollars, as recited in the deed, conveyed the premises by a correct description to his co-defendant, Angeline, his wife, this deed containing the recital: "And this deed is made to correct a deed made by the first party to Everett Drake, dated February 23, 1856, and recorded in book J of deeds, pages 110 and 111, of Clinton County records. And to correct a deed from the said Everett Drake to the said second party herein, dated February 5, 1858, and recorded in book Q of deeds, pages 408 and 409, of said Clinton County records"; that on the same day this instrument was properly indexed as a deed, and was in due time properly recorded; and that in June, 1861, Kennedy and his wife commenced making improvements on the land, breaking and fencing it, and these improvements were in progress when it was sold under execution. The answer of the defendant Angeline Kennedy contains all the above allegations, and prays that her title may be quieted, and confirmed in her against said plaintiff, and for costs. The plaintiff filed a replication to this, and prayed that his title might be quieted, etc. The equitable defense was by agreement tried first, and

the court found for the defendant Angeline, and ordered that her title be quieted as against plaintiff. Plaintiff appealed.

D. B. Nash, and Thompson and Campbell, for the appellants.
Cook and Drury, for the appellee.

By Court, WRIGHT, J. The case may be divested of many of the difficulties suggested by appellants' counsel, by recurring to some facts to our minds well established by the evidence.

These defendants, nor either of them, ever owned or pretended to own, the southeast quarter of the northwest quarter of section 12, township 81, range 2. Nor was it ever owned by Everett Drake. The land sold by Kennedy to Drake, and intended to be conveyed, was the southwest quarter, etc., and this same land Drake intended to convey to his daughter.

The mistake was an innocent one, there being no intention to mislead or defraud any one. The deed from the husband to the wife was made for the purpose of correcting these mistakes. Kennedy received a valuable consideration from Drake, for the conveyance of February 23, 1856, to wit, property of about the value named in the deed. The recital in the deed to the wife, of July 27, 1861, refers correctly and with entire accuracy to the dates of the prior deeds, and the books and pages where each were recorded. The deed from Drake to his daughter was founded upon the consideration of "natural love and affection" alone. He lived in this state at the time Kennedy conveyed to him, during the same year removed to Virginia, and that fall, having determined not to return, he expressed his intention to give this land to his daughter, and accordingly in 1858 made the deed. The mistake was not discovered until in 1861, about the time the husband conveyed to the wife. When the debt was contracted, upon which the judgment was recovered, under which plaintiff claims, does not appear.

The question of when possession was taken, what improvements were made, and the effect of the same upon plaintiff or the purchaser, at the sheriff's sale, is, in our opinion, of but little if any importance. If this was a contest between the defendant Angeline and the heirs of Drake, in which she sought a correction, as against them, of the deed of February 5, 1858, it might become material to inquire whether she

took possession under and pursuant to the agreement to convey, which equity might imply from the deed containing the wrong description, as also whether the improvements made would not give her this right, though the deed was founded alone upon a good, as distinguished from a valuable, consideration. But for the present, we shall assume that these questions are out of the case. The only effect of the claimed possession being that of notice of ownership or claim of right to the purchaser at the sheriff's sale, we remark that we give it no weight, for the reason that the possession was ostensibly as much in the husband as the wife, and she, therefore, is entitled to nothing on that ground. And here let us be understood. There was no building upon the land. A month or more before the sheriff's sale, hands were put to work fencing and breaking it, under the direction of both husband and wife, he acting, as he says, for the wife. He, however, was upon the ground, assisting and directing, apparently for himself, no one knowing by any public declaration or act, or otherwise, that the work was being carried on for the wife, nor that the possession then taken was for her. And we are not prepared to hold that, under such circumstances, third persons would be affected with notice of the wife's possession. In other words, they could as well, and indeed more reasonably, presume that the possession was that of the husband as of the wife, and it would be carrying the doctrine of notice to an unusual extent to hold that the world was, without more, bound to know that he was in possession and making improvements for her. It would be very different if it was claimed that she was to be prejudiced and her rights affected by his apparent acts of ownership, while employed for her and engaged by her direction in expending her means in improving the land. As the case now stands, we inquire alone, as above suggested, whether his possession was so clearly and notoriously hers as that the party under whom plaintiff claims was bound to take notice of it. We conclude not, and if defendant (the wife) has no better ground upon which to stand, her title must fail.

It is a mistake to regard this as a proceeding, on the part of the defendant Angeline, to enforce a specific performance of a contract to convey on the part of the father. And therefore, what would be her rights, as against the other heirs, and if they were here contesting her right to such relief, treating her as a mere volunteer, and how far her claim would be

within the disabling effect of the statute of frauds, are questions entirely foreign to the present inquiry. She stands as against this plaintiff strictly on the defensive.

She asks to be relieved in her answer as against him on his pretended title, and this is the extent of the judgment in her favor. As equity would have compelled the husband to correct this mistake, it was perfectly competent for him to do voluntarily that which she could have enforced. She is not a mere volunteer asking a court of equity to enforce a voluntary gift from the father to her against the other children. Nor is she claiming under a parol gift. She is claiming under a deed,—a deed, too, from the very party under whom plaintiff claims. What effect this deed had is another question to be hereafter considered. Plaintiff is not claiming under a deed from the other heirs, nor under one from the ancestor. The very basis of his claim—and this destroyed, he has no title—is, that the defendant in execution, W. W. Kennedy, never parted with the title to this land, and that Drake never owned, and hence, of course, that his heirs never did. His claim is adverse to any possible right of these heirs in the land. The defendant Angeline is not, by a bill in equity, seeking a discovery and relief, as against a conveyance made by Drake or the other heirs, to plaintiff or the party under whom he claims. If she was, the case would be analogous to *Findly v. Hinde*, 1 Pet. 241; *Simms v. Guthrie*, 9 Cranch, 25; *Mallow v. Hinde*, 12 Wheat. 193,—relied upon by appellant. Nor is she, as already stated, asking to enforce a voluntary contract,—one founded upon a merely good or meritorious consideration, and hence, too, the doctrine found in 2 Story's Eq. Jur., sec. 793 a, and which we do not by any means controvert, is entirely inapplicable. And the same is true of *Froman v. Froman*, 13 Ind. 317, the correctness of which is not denied. That was a contest between heirs, one of them claiming under a voluntary deed, which he asked to have reformed. Here defendant no longer stands upon a voluntary deed founded upon a good consideration, but claims under a deed which vests her with the absolute legal title, subject, as against plaintiff, to the lien of the judgment under which he claims. And thus we might, by a reference to all the authorities cited by appellants, show how entirely they are inapplicable to the case before us. The foregoing, however, must suffice.

We have not thus far, in words, held that the heirs of Everett Drake were not necessary parties,—a point upon which ap-

pellants' counsel rely with much confidence to reverse this case. And yet the preceding views, in effect, dispose of it. In giving it, however, some further attention, let us briefly glance at the situation of the parties to the record and controversy.

Plaintiff brought his action at law. The defendant set up an equitable as well as a legal defense, and this she had a right to do. If the deed from W. W. Kennedy to her had been made prior to June 16, 1861 (the day the transcript of judgment was filed in Clinton County), she could have stood successfully upon her simple legal title. The conveyance to Drake and from Drake to her would, so far as concerned the naked title at law, have been of no consequence. If plaintiff relied upon fraud in that state of case, he would have been driven to an equitable forum. But made as this deed was, after the lien of the judgment attached, plaintiff's title taking effect by relation to the date of this lien, defendant deemed it safer and better (as it was) by an answer setting up an equitable defense, to present the grounds why plaintiff's title should not and could not thus date from the filing of the judgment. And that it would not, we may remark in passing, is plain from the consideration that the lien of the judgment attaches, not to the naked legal title, but to the judgment debtor's interest in the land: *Blaney v. Hanks*, 14 Iowa, 400; *Bell v. Evans*, 10 Id. 354; *Norton v. Williams*, 9 Id. 528; *Seever v. Delashmutt*, 11 Id. 174 [77 Am. Dec. 139]; *Fords v. Vance*, 17 Id. 94. Now, in thus setting up her equitable defense, was it necessary that she should make the heirs of Everett Drake parties to the action? And if so, upon what ground?

Without recurring further to the fact that defendant does not, by an original bill, seek discovery and relief,—a fact which we now leave entirely out of view,—we remark that appellants' claim of want of parties is based upon the idea, and indeed, besides this, has nothing upon which to stand; that plaintiff holds under Drake, and not under Kennedy, and that defendant Angeline holds adversely to such supposed claim. Than this, however, there could be no greater mistake. Both parties take from Kennedy, the one by judgment title, the other by the deed, which she claims in equity is prior in point of time to the lien of such judgment. Now, if Kennedy had made a deed, properly describing the land, to Drake, and the latter had conveyed to the wife by a wrong description, and if after this Drake had, by a good description, conveyed the land

to plaintiff, in a contest as to their respective equities, these heirs might have been necessary, certainly would be proper, parties. For then they would be interested at least to the extent of the covenants contained in the deed of their ancestor. But that is not this case, by any means. For how, by possibility, could these heirs be affected by this litigation, or what interest have they in it? It is a contest as to whether plaintiffs' apparent title should prevail over defendant's equity. The judgment settles nothing as against these heirs. It in no manner concludes them. The deed from Kennedy to his wife can have no such effect. Their rights are just as indisputable, just as complete, as though that deed had never been made, as though this judgment had never been entered. The adding to the judgment, that the defendant's title should be quieted as against plaintiff, does not make the case different. It has no other or further effect than the language implies. This would have been the legitimate effect of a simple judgment in her favor until set aside. Indeed, it seems to us that these heirs were no more necessary parties than if the case had been heard alone upon a legal defense. They are not even consequentially interested or affected by this litigation. And without extending the argument, see upon this subject the following authorities, which place the matter beyond all doubt: Mitford's Eq. Pl. 170; Story's Eq. Pl., secs. 228, 226 a; *Glyn v. Soares*, 3 Mylne & K. 450.

We have only, then, to inquire finally, What was the effect of the deed of July, 1861, from Kennedy to his wife? It will be remembered that it was made and recorded after the lien of the judgment attached, as also after the levy, but before the sale. If it had been made before the lien attached, though filed for record after and before the sale, there can be no doubt, under our former decisions (and particularly *Norton v. Williams*, 9 Iowa, 528, and see other cases before cited, as also *Welton v. Tizzard*, 15 Id. 495), that it would give defendant the better title. It was made, however, and of course recorded, after the judgment lien attached. If before the sale, the grantee therein, the present defendant Angeline, had filed her bill setting up these facts, and had established them, there can be no doubt, under the authority of *Welton v. Tizzard*, *supra*, that she would have succeeded in removing the cloud. In that case, however, there was nothing of record to affect the judgment creditor with notice of the mistake in the deed, nor of the grantee's or mortgagee's equity, and hence the necessity

of proceeding before sale. Here, according to defendant's theory, there was notice, and as plaintiff, or the party under whom he claims, took affected thereby, his title is entirely defeated. And just here is the turning point in the present inquiry. Was plaintiff, by the indexing of this deed,—or rather was Selden,—bound to take notice of all that this deed contained? and does the fact that it was made after the judgment place him in any better position than if it had been made before and recorded afterward?

In accord with the prior rulings on this subject, we think the true doctrine is, that the purchaser is bound to know or take notice of the condition of the record title up to the time of the sale. And if actual notice, on the day and at the time of sale, would have affected him, the same is true of instruments filed for record, and which become by that act constructive notice. If properly indexed, he is affected with all that it contains. And if thereby put upon inquiry, he is bound to take notice of all that he might have learned by pursuing the path thus indicated. Upon this principle rest numerous decisions of this court, and of its correctness there can be no doubt: *Barney v. Little*, 15 Iowa, 527; *Bostwick v. Powers*, 12 Id. 456; *Calvin v. Bowman*, 10 Id. 529; *Scoles v. Wilsey*, 11 Id. 261.

Applying these rules, Selden was bound to know, and in legal contemplation did know, when he purchased at the sheriff's sale, that Angeline Kennedy held the legal title to this land. Not only so, but he knew the contents of the deed under which she held, just as though the same information had been given to him orally at and before the purchase. Knowing this, there is no difficulty in determining the extent of information to which the proper inquiry would have led him. This deed advised him, necessarily, fairly, and legitimately, that long prior to the filing of the judgment this land had been sold, and that when the lien attached, though the title was in the debtor, all interest had passed from him, and was vested in another. If he had been told at the sale that the prior deeds were intended to convey this land, and that it was in fact sold, he would have been put upon inquiry, and if this had been subsequently established, the equity would have prevailed. He was told this, in effect, by this record. And having this notice, he ought not in conscience to take the title discharged of the equity: *Nailor v. Fisk*, 27 Miss. 256; *Williamson v. Brown*, 15 N. Y. 354.

We remark, in conclusion, that this deed was an instrument, the filing of which for record imparted to these persons notice of its contents, and that it is therefore in every respect unlike that referred to in *Brown v. Budd*, 2 Ind. 442, to which we are referred by counsel. So, too, the case of *Lewis v. Baird*, 3 McLean, 56, holds that the record was not notice, because, under the ordinance of 1787, the recordation of an equity is not included, but only conveyances of the legal title. And to the same effect are the other authorities cited to this point.

Their correctness is not controverted. Their applicability, however, is not perceived. Errors overruled, and judgment below affirmed.

LIEN OF JUDGMENT ATTACHES TO DEBTOR'S ACTUAL INTEREST IN LAND: See the extensive note to *Filley v. Duncan*, 93 Am. Dec. 337, 346; *Churchill v. Morae*, 92 Id. 422. The principal case is cited to the point that a judgment operates as a lien only upon the lands actually owned by the judgment defendant: *Rider v. Kelso*, 53 Iowa, 370.

DEED RECORDED BEFORE EXECUTION SALE TAKES PRECEDENCE OF SHERIFF'S DEED: See *Leger v. Doyle*, 70 Am. Dec. 240, and note 246; see also *Ayres v. Duprey*, 86 Id. 657, and note 669; *Blair v. Chamblin*, 89 Id. 322.

WIFE'S POSSESSION JOINTLY WITH HER HUSBAND will not impart notice of equities which she holds against him to one claiming under the husband: *Iowa Loan and Trust Co. v. King*, 58 Iowa, 600, citing the principal case.

WHERE EQUITY WOULD COMPEL PARTY TO CORRECT MISTAKE, it is perfectly competent for him to do voluntarily that which could have been enforced: *McCready v. Sexton*, 29 Iowa, 381, citing the principal case.

PETERSON v. MISSISSIPPI VALLEY INSURANCE CO.

[24 IOWA, 494.]

RISK ASSUMED BY INSURANCE COMPANY IN INSURING HORSES described with other insured property as situated in "section 22, town 99, range 7 west," which was the farm of the assured, is not necessarily limited to the use of the horses on section 22, if there is no express provision in the policy so limiting their use, but extends to the ordinary and beneficial use of them, whether on the farm, or temporarily absent therefrom; and the company is liable where the assured, while hauling his grain to market, stopped over night at a hotel and put his horses in the hotel barn, and the barn, together with one of the horses, was destroyed by fire during the night, notwithstanding the company had not consented to the use of the team off from section 22, the policy containing the usual condition against increasing the risk without the company's consent.

ACTION on a policy of insurance for the value of a horse consumed by fire. The property was described in the policy

thus: "On his dwelling-house, \$400; grain in stack or crib, \$600; hay in stack, \$320; seven horses, \$750; cattle, \$275. Situated section 22, town 99, range 7 west." The policy contained the condition: "If the risk be increased by the erection of adjacent buildings, or by any other means whatever, without the assent of the company, the policy shall become void." It appeared that the plaintiff, who was a farmer, was, on a date covered by the policy, engaged in the ordinary pursuit of his business in hauling his grain to market, and while so doing, stopped over night at the Tremont House, in Decorah, and put his team, which was part of the seven horses insured, into the hotel barn. The hotel and barn were destroyed by fire during the night, and with them a mare worth \$170 belonging to the team; and for the loss of this animal the action is brought. It was not claimed that the company had assented to the use of the destroyed property off from section 22; and there was evidence introduced which tended to show that property in the hotel barn was more exposed to loss by fire than if kept and used upon the farm. And the defendant accordingly contended that they were not liable, since the risk had been increased, and the loss had occurred when the mare was not on section 22. The court instructed that there was no condition, express or implied, in the policy, limiting the plaintiff's use of the property to section 22, and that the plaintiff was entitled to recover if he came to town temporarily to stay over night, and was ordinarily prudent in the selection of a barn. The defendant excepted to this instruction, and verdict and judgment being rendered for the plaintiff, appealed.

E. E. Cooley, for the appellant.

L. Bullis and R. Noble, for the appellee.

By Court, DILLON, C. J. This is an action on an ordinary fire policy. It is, of course, to have a reasonable construction. The policy and application are in the usual form. It is evident from reading the policy, and the numerous conditions it contains, that it is specially designed and adapted for buildings, and the contents of buildings, and not for live-stock. It is plain that there is, as charged by the court, "no express provision in the policy limiting the plaintiff's use of the property to section 22."

The only claim on the part of the company that there is

such a limitation is based wholly upon the description of the property insured, as contained in the policy and the application. The description will be found in the statement. In our judgment, the language there used is intended to describe the situation—the location—of the property, and not to limit the use of the horses to the section of land therein mentioned.

Is there an implied restriction in the policy of the use of the horses to the section named? We think not, because such a limitation would be unreasonable.

In effecting this insurance, and paying the company for the risk it assumed, it cannot be supposed that the plaintiff was to be deprived, upon the peril of forfeiture of his policy, of the ordinary and beneficial use of the property insured. The insurance extended through five years. Is it to be supposed that every time the plaintiff had occasion to go off of section 22 to church, to mill, to market, or for fuel, he should go to the city of Decorah and get "the assent of the secretary of the company indorsed thereon"? It may be said that the plaintiff could procure a general assent from the company. But how can it be known that the company would give it? If the company had told the plaintiff at the time of taking the risk, as they now assert is the case, that every time your team passes the boundary of section 22 it passes out of the protection of the policy and renders it void, he would hardly have agreed to pay his money for such an insurance so precarious. If defendant's view be correct, the plaintiff could not have recovered if his horse had been killed by lightning while he was on his way to obtain the company's consent, provided he did not happen to be upon section 22 at the time.

Confining the opinion expressed to the precise case before us, and to the precise character of the property for the loss of which the action is brought, there being in the policy no provisions other than those before referred to applicable to the question of defendant's liability, we concur in holding that the risk assumed by the company was not necessarily limited to the use of the plaintiff's team on section 22, but extended to the usual and ordinary use of the team, whether on the farm or temporarily away from it. To hold otherwise would be scarcely less unjust to the plaintiff than disastrous in its tendency to insurance companies. If they could escape liability on such defenses, the business of insurance would soon fall into popular disfavor and merited odium. In holding insurance companies liable in cases like the present, we are,

whether they will believe it or not, promoting their best interests, as well as guarding those of the public, upon whose patronage they are entirely dependent.

Confidence in the companies, without which they cannot live, will indeed be a plant of slow growth in the public mind, unless that confidence is deserved.

The learned judge did not err in the directions given to the jury, and the judgment is affirmed.

INSURANCE OF MOVABLE PROPERTY, INCLUDING LIVE-STOCK, AND EFFECT OF REMOVAL. — Locality is an element in the contract of insurance, to the extent that the policy becomes inoperative, if the location of the risk, at the time of the loss, is such as not to fall within its terms. The effect of removal of the property, upon the contract, becomes therefore a matter of common inquiry.

Where property is described as being "contained in" a certain building, the words describing the location are generally treated as the statement of a fact relating to the risk: *Wall v. East Riv. R. R. Co.*, 7 N. Y. 370; and have been held to amount to a stipulation that the property shall remain at such place: *Houghton v. Manufacturers' F. I. Co.*, 8 Met. 254; *Boynnton v. Clinton etc. I. Co.*, 16 Barb. 254. The latter statement is too broad, however, and must be taken with some limitation. The question whether property insured shall so remain, or whether it may be removed, is made to depend, to a certain extent, upon the nature and uses of the articles: *Pelly v. Royal Exchange Assurance Co.*, 1 Bunb. 341; *McCluer v. Girard F. & M. I. Co.*, 48 Iowa, 349; *Holbrook v. St. Paul F. & M. I. Co.*, 25 Minn. 229. In *London etc. F. I. Co. v. Graves*, 12 Ins. L. J. 308 (Ky.), the court say: "The words 'contained in' must be construed with reference to the nature of the property to which they are applied. In insurance of personal property, which is generally kept in one place, and whose use does not require it to be moved, such as a stock of merchandise in a store, or carriages in a wareroom for sale, the location is an essential element of the risk, and is generally a continuing warranty; but in insurance on property whose ordinary use requires it to be moved from place to place, the presumption is, that it is in use, and that the policy is issued in reference to such use." In the former case the words are taken as a continuing warranty; in the latter they are taken as words of description, and only as a warranty that the property will continue in the place named when not absent for temporary purposes incident to its ordinary use and enjoyment: *Everett v. Continental Ins. Co.*, 21 Minn. 76. The rule to be deduced, as stated by Wood, is that "the temporary removal of property, whether occasional or habitual, in pursuance of a use which is a certain necessary consequence arising from the character of the property, without any change in the ordinary place of keeping, will be no defense to an action on the policy": 1 Wood's Fire Insurance, 2d ed., p. 118, sec. 47.

Permanent Removal. — A permanent removal of property insured, from the place where it is described to be, will render the policy inoperative. Thus where plaintiff obtained a policy of insurance upon his household furniture, which was described as being "all contained in house at No. 2, Blank Street," and he subsequently, without the knowledge or consent of the insurer, removed the furniture to another house to which plaintiff had removed his residence, the insurer was held not liable: *Lyons v. Washington Ins. Co.*, R. I.

Sup. Ct. 1883, 44 Am. Rep. 34, note, overruling same case 13 R. I. 347; S. C., 44 Am. Rep. 32. So a permanent removal of tools, pumps, etc., contained in a certain described building, to another building answering the same general description, and thirty feet distant from the former, was held to render the policy void: *Harris v. Canadian Ins. Co.*, 58 Iowa, 236.

Temporary Removal—Animals and Other Movable Property.—Where an insurance was upon certain mules "all contained" in a certain barn, and the mules were killed while out of the barn and cultivating the farm, the court held that the words "contained in," etc., were merely words of description, and not a stipulation on the part of the insured that the location of the property insured should not be changed, so as to prohibit the enjoyment of the natural use of the property; and the court said further that this would be the rule though the change of location for proper purposes increased the risk, for the company would be presumed to have contracted with reference to such risk: *Holbrook v. St. Paul F. & M. Ins. Co.*, 24 Minn. 229. In *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400 (citing the principal case), it was held, under a policy insuring "live-stock on premises situated sections 7, 76, 27," that the insurer was liable for loss by the death of a horse, owned by the insured and ordinarily kept on the premises, which was killed by lightning at a place six miles distant from such premises, and while the owner was driving him to the mill. *Holbrook v. St. Paul F. & M. Ins. Co.*, *supra*, is decided on the authority of *Everett v. Continental Ins. Co.*, 21 Minn. 76, a case in which a thrashing-machine insured as "stored in a barn on sections 36, 23, 28," was destroyed while in use in the field, and for which the company was held liable on the same grounds. In *London etc. F. Ins. Co. v. Graves*, 12 Ins. L. J. 308, and cited *supra*, certain buggies were insured as "contained in" a certain livery-stable. They were destroyed by fire while at a carriage factory for repairs. The company was held liable, as it was said that the absence of the buggies for repairs was incident to their use. *McCluer v. Girard F. & M. Ins. Co.*, 48 Iowa, 349, was a case almost identical and similarly decided. Where a policy was issued to a railroad company upon "their road furniture, consisting of locomotives, cars, etc., on the line of their road, and in actual use," and certain of the cars were destroyed while upon a side-track erected by a wharf company, and upon which they were accustomed to run while waiting for freight, the insurer was held liable, the court saying that if insured had adopted the side-track as part of its line for practical purposes, the fact that the track was owned by others would be no defense: *Fitchburg R. R. Co. v. Charlestown etc. Ins. Co.*, 7 Gray, 64. In *Longueville v. Western Ass. Co.*, 51 Iowa, 553, S. C., 33 Am. Rep. 146, the policy covered "household furniture, including sewing-machines, provisions, and family wearing apparel, all contained in a certain dwelling-house." Plaintiff claimed damage for injury by fire to an overcoat and other wearing apparel while being worn by him in the ordinary way at a place away from the premises insured. The court held the company liable, saying that the provision of the policy could not have been meant to apply only to wearing apparel contained in the dwelling, but that it must be held to include apparel in ordinary use at the dwelling and elsewhere.

Location of Risk.—If property is insured as being upon premises "occupied by the assured," the premises occupied by him at the time of the issuance of the policy are meant, and not premises which he may subsequently occupy, and to which he may remove the property insured: *Providence R. R. Co. v. Yonkers F. I. Co.*, 10 R. I. 74. A policy insuring goods described to be in a certain building covers such goods in any part of the building, though at the time the policy issued they were all in a particular part of the

building: *Fair v. Manhattan Ins. Co.*, 112 Mass. 320. But if insured as being upon a certain floor of the building, or in a certain room therein, the liability on the policy continues only while the property is in such place, and not when in another room or on another floor, except it be removed for proper temporary purposes: *Storer v. Elliot Ins. Co.*, 45 Me. 175; *Moadlinger v. Mechanics' F. I. Co.*, 2 Hall, 496; *West v. Old Colony Ins. Co.*, 9 Allen, 316; *Boynston v. Clinton Ins. Co.*, 16 Barb. 254. If property is insured by mistake as being in one building when it really is in another, it is not covered by the policy: *Severance v. Continental Ins. Co.*, 5 Biss. 156; *Eddy St. Foundry v. Camden Ins. Co.*, 1 Cliff. 300; and so where by mistake the property was described as being in one section of a warehouse, when it was really in another section: *Bryce v. Lorillard F. I. Co.*, 55 N. Y. 240; S. C., 14 Am. Rep. 249. Where furniture was insured as being in a certain dwelling-house, and the dwelling-house was burned, but the furniture saved and stored in the barn, it was held that the company was not liable for loss of the furniture by fire while in the barn: *Hartford Ins. Co. v. Farrish*, 73 Ill. 166. It was held that an insurance company was not liable for goods lost while in a brick addition to the wooden house in which they were insured: *Lycoming F. I. Co. v. Updegraff*, 40 Pa. St. 311.

Extrinsic evidence may be resorted to to determine whether property insured is on the premises described, or not, or within the location in the policy. Thus where ship-timber in a certain ship-yard was insured, evidence was admitted of a usage among lumber merchants to keep timber on the street near the yard: *Webb v. National Ins. Co.*, 2 Sandf. 397.

Permission to Remove. — Where permission is granted to remove goods, the liability of the insurer will continue until the removal, and though they are not moved at all: *Kunze v. American Ins. Co.*, 41 N. Y. 412.

COVENANT IN POLICY OF INSURANCE THAT INSURED WILL KEEP the stoves and pipes on the premises in proper condition will not be extended beyond the subject and time contemplated by the parties: *Mickey v. Burlington Ins. Co.*, 35 Iowa, 178, citing the principal case.

STATE v. VINOENT.

[24 IOWA, 570.]

ON TRIAL FOR HOMICIDE COMMITTED WHILE DECEASED AND PRISONER WERE ON JOURNEY TOGETHER, evidence of statements of the deceased while engaged in the journey, about where they had come from, and where they were going, are admissible as part of the *res gestæ*, though not made in the prisoner's presence.

IMPEACHED WITNESS CANNOT BE SUPPORTED BY PROOF OF STATEMENTS made by him before the trial, which correspond with his testimony.

WHERE WITNESS IS CHARGED WITH DESIGN TO MISREPRESENT, on account of his changed relation to the parties or the cause, evidence of like statements made by him before such change of relation may be admitted; so if the attempt is to show that his testimony is a recent fabrication, or when long silence concerning an injury is construed against the injured party, it is proper to show that the witness made similar statements soon after the transaction in question.

DECLARATION OF PERSON CHARGED TO HAVE BEEN MURDERED, made before leaving home, that he intended soon to leave, and never make himself known to or be heard from by his family, is not admissible on the trial for the murder, though the defendant claims that the body found was not the body of that person.

TESTIMONY OF PHYSICIANS THAT IT WOULD BE IMPOSSIBLE FOR ANY ONE TO IDENTIFY a human head after preservation for a certain time in alcohol is not admissible, for it is a conclusion from facts which can be drawn by the jury alone. It would be competent, however, for the witnesses to state the character and nature of the changes produced by death, and to explain or illustrate to what extent these changes had operated upon the head in question.

BURDEN OF PROVING THAT PERSON CHARGED AS MURDERED WAS ALIVE at the time of the alleged murder, after *prima facie* proof that the body found was his, is upon the prisoner, and the evidence, as in the case of proving an *alibi* of the prisoner, must outweigh the evidence of the prosecution.

INDICTMENT for murder under which the prisoner was convicted of manslaughter, and sentenced to imprisonment in the penitentiary for the term of eight years. The opinion states the case.

Martin and Murphy, for the appellant.

Henry O'Connor, attorney-general, for the state.

By Court, BECK, J. The alleged crime for which the prisoner stands convicted was committed in May, 1863, and he was not arrested for more than three years afterward. The evidence against him is almost exclusively of a circumstantial character. We can scarcely refer to a case that has fallen within our knowledge which presents such numerous, varied, complicated, and at the same time concordant circumstances, upon which it became necessary to determine the guilt or innocence of an accused, as the record before us discloses. The identity of the prisoner and the deceased, their presence together in the neighborhood where the body of the murdered man was found at the time the crime was committed, dates of facts and circumstances necessarily developed indicating the guilt or innocence of the prisoner, — all were mainly, and most of them wholly, established by circumstantial evidence. The defense is based on an alleged *alibi* of the prisoner, and also that the body of the murdered man was not, in fact, that of Claiborn Showers, who, it is claimed by the prisoner, was in life long after the date of the crime.

In support of the theories of the prosecution and defense, a

great number of witnesses were examined, many of whom resided at distant places and in other states.

Facts and circumstances were proved that transpired hundreds of miles away; positive testimony was sought to be overthrown by proof of inconsistent circumstances, which were also attempted to be sustained or overthrown by other corroborating or conflicting facts. Taken together, the evidence, as it appears in the record, is intricate in the extreme, and very voluminous, covering four hundred pages. The trial below, as well on the part of the state as for the defense, was conducted with marked ability. The number of errors assigned upon the record and urged upon our attention do not equal the number usual in cases of like character,—a fact readily accounted for by the abundant evidence we have in the record of the careful and impartial manner in which the learned judge presiding at the trial discharged his duty in the conduct of the case.

1. During the progress of the trial, the state introduced evidence tending to establish the fact that the prisoner and deceased, about the twenty-seventh day of April, 1863, were together in Monticello, in Jones County, having in their possession a team answering in description to one taken by deceased from his home, in Henry County, Illinois, which they traded at that time for another team, a span of dun-colored horses, with which they left on their journey, going in the direction of Poweshiek County, where the alleged crime was committed.

Evidence was also introduced by the state tending to prove that the prisoner and deceased were, a few days before the discovery of the body of deceased, who evidently met death by violence, within half a mile of the place where the body was found, having in their possession a team of dun-colored horses. They spent the night together, and had conversations with a witness for the state, John Mariatt, in the presence of each other, in which they referred to the fact of their having been that day in Marengo, and related that the deceased had driven the team away and left the prisoner, giving him much trouble in overtaking his comrade. Another witness had testified that the prisoner, who was well known to him, was in Marengo about the day the said conversations were had, in company with another man, who was driving a dun-colored team; that he conversed with the prisoner, who hurried away because his companion with the team was leaving the town,

going westward, toward the place where they spent the night, and where the said conversations were had. The deceased informed the witness John Mariatt, at that time, but not in the presence of the prisoner, that he had traded for the team at Monticello; that he and his companion were from Wisconsin, and were going to the gold mines. After the introduction of the evidence, against the objection of the prisoner's counsel, the court, upon their motion, struck out all that part thereof in regard to trading horses at Monticello, and informed the jury that it was excluded from their consideration, — holding, however, that what the deceased "said about where they had come from, and where they were going, being engaged in the journey, might be received as part of the *res gestæ*, but that other conversation, not in the presence of the accused, was excluded, and that made in his presence, he taking part in the conversation, admitted." The admission of the evidence of the witness John Mariatt, relating to the declarations of the deceased, under this ruling, is assigned for error, and is the first point pressed upon our attention. We do not think the evidence is obnoxious to the objection that it is a narrative of a past occurrence, as urged by the prisoner's counsel, but that the rule as laid down by the district court is correct, and sustained by the authorities: 1 Greenl. Ev., sec. 108.

2. Two witnesses on behalf of the prisoner testified that deceased, Claiborn Showers, was at their house, in Davenport, in 1865; and a third one stated that he had seen him in 1864, upon the battle-field of Allatoona, Georgia. The credibility of these witnesses was assailed upon cross-examination; that of one, also, by an effort to show that he had made a different statement on oath, and of another, likewise, by evidence showing that she had made statements conflicting with her testimony. To support the evidence of these witnesses, the prisoner offered to prove that they had made statements agreeing with their testimony upon the trial long before the arrest of the prisoner, and before he was suspected of the crime, and before the witnesses had heard that it was believed Showers had been murdered; the court refused to admit such testimony, and this ruling is assigned as error.

When the credibility of a witness is impeached by direct testimony of his want of reputation for truth, or of his general moral character (which may be done under our statute), or by proof of his having made or testified to different and conflicting statements, he cannot be supported by evidence

that statements of the facts made by him before the trial correspond with his evidence.

The following are exceptions to the rule: If the witness is charged with a design to misrepresent, on account of his changed relation to the parties or the cause, evidence of like statements before such change of relation may be admitted; so, if it is attempted to be shown that the evidence is a recent fabrication, or when long silence concerning an injury is construed against the injured party, as in cases of an indictment for rape, — in such cases it is proper to show that the witness made similar statements soon after the transaction in question.

This rule is well settled in England, and though there are cases holding a conflicting doctrine, yet it appears to be supported by the greater weight of authority in the American decisions: 1 Stark. Ev. 187; 1 Greenl. Ev., sec. 469; 2 Phil. Ev., Cowen and Hill's and Edwards's notes, 978; *Gibbs v. Linsley*, 13 Vt. 208; *Reed v. Spaulding*, 42 N. H. 114; *Smith v. Stickney*, 17 Barb. 489.

State v. Rorabacher, 19 Iowa, 154, cited by the prisoner's counsel in support of the doctrine for which they contend, recognizes no principle bearing upon it; and *State v. Cruise*, 19 Id. 312, is not by any means in point. In the last-mentioned case, evidence of a statement of the witness, made before the crime was committed, of a circumstance happening before the offense, is held competent, on the ground that as it was utterly impossible for the witness to foresee the event which he narrated, and thus manufacture evidence in support of his credibility, and because the time of the happening of that event was in dispute, the fact that the witness did narrate the circumstances should have been admitted in evidence to corroborate him. Thus evidence of the witness's statement was held admissible, not to sustain his credibility, but as an independent circumstance, tending to corroborate his statement as to the time a certain event happened.

3. The prisoner offered to prove by a witness produced in court that the deceased, before he left home, informed the witness that he intended soon to leave, and when he left, he would never make himself known, or be heard from by his family. The introduction of this evidence was not permitted by the court, which is assigned for error. We know of no rule under which it is admissible, and no authorities are cited or reasons given to sustain its competency.

4. At the time the remains of the murdered man were

found, the head had been severed from the body, and was by a physician preserved in alcohol. It was exhibited to the court and jury at the trial. Many witnesses for the state identified the head as that of Claiborn Showers. The greater portion of them recognized it by the features alone; others, in addition, discovered peculiar marks upon the teeth, which seemed to increase their confidence in its identity. The prisoner proposed to prove, by two witnesses, who were physicians and surgeons, and whose knowledge and attainments in their profession made them familiar with the natural changes through which a human body must necessarily pass after death, that on account of such natural and inevitable changes, it was not possible for any one to identify the head. The court refused to permit the evidence to go to the jury.

The rule which admits in evidence the opinions of persons of learning and skill on questions of science and art has never been extended so far as to admit testimony of this character.

It would have been competent for the witnesses to have stated the character and nature of the change in the human body, produced by death within certain periods of time, and to have explained or illustrated to what extent these changes had operated upon the head of the deceased; and to have stated their usual and necessary effect according to the laws of nature. The progress of decay, the distortion and discoloration of the features, and the consequent change or destruction of the peculiar expression of the countenance, by which human faces are usually distinguished and identified, as shown by the head in question, would have been proper facts for the witnesses to have pointed out and explained to the jury. When so instructed the jury could have determined, and it was for them alone to determine, whether it was possible for those knowing the deceased in life to identify the head. The witnesses were expected to state their opinion as to a fact which was a conclusion from other facts. Now, while the facts upon which they based their opinion may have been peculiarly within their knowledge as scientific men, namely, the natural change and decay of a dead body, yet the conclusion, the consequent fact, the possibility of identifying the head, they were no more capable of determining than those not learned in anatomy and chemistry. It may be probable that the evidence of these witnesses on the question of identity, they having known deceased in life, or having before them a picture admitted to be correct, or in any other way made familiar with

the features of deceased, would be of greater weight than that of those who have not made the human body a study. In a case involving the genuineness of a signature, an expert may be allowed to give his opinion concerning it. Upon evidence of this character, forgeries are often established. But an expert, in such a case, would not be permitted to state an opinion that the signature could or could not have been made by the accused or the person denying it, or that others could or could not detect its real character; but he might state facts and point out characteristics from which the jury could be justified in drawing such conclusions.

The admission of the evidence of the physicians, as offered by the prisoner, was properly refused by the court.

5. One of the defenses made by the prisoner is, that the body of the deceased is not that of Claiborn Showers, and that after it was found, he was in life, and was seen by four witnesses at different times and places. This defense is termed an "*alibi* of the alleged deceased" in the instructions of the court and argument of the counsel, and the jury were instructed that, to sustain it, the same weight of evidence was necessary as to sustain the *alibi* of the prisoner, which was also a defense, and that the burden of proof of each was upon the prisoner. This, it is urged, is error.

The *alibi* of the prisoner, and the existence in life of Claiborn Showers at the time of the alleged murder, are each independent propositions totally inconsistent with the guilt of the prisoner. It is evident the burden of proof of each rests upon the prisoner, for neither, against *prima facie* evidence of its corresponding inconsistent proposition of the prosecution, will be presumed. These defenses, then, must be sustained by the prisoner, and the evidence necessary to sustain either of them must be sufficient to outweigh the proof tending to establish its contradictory hypothesis.

This is the doctrine of the instructions objected to, and it is sustained by reason and the authorities.

6. It is urged that the verdict of the jury is not sustained by the evidence. Upon a careful consideration of the whole evidence, and a comparison of facts and circumstances proved by the witnesses for the defense as well as the state, we are not prepared to hold that the verdict is not sustained by the evidence. We have given to the evidence most patient and protracted study, and the more familiar we become with it, the stronger become our convictions of the justice of the verdict.

7. As we are by law required to do, we have given a careful examination to the whole record, and considered, not only the points assigned for error and argued by the prisoner's counsel, but all others upon which it appears that questions may be made, and have found no error.

8. It is urged that the sentence is extreme, and we are asked to reduce the term of imprisonment. The verdict was doubtless based upon a presumption in favor of the prisoner indulged by the jury that the crime was committed under circumstances which would reduce its character to manslaughter. This presumption is hardly justified by the facts of the case.

The mutilated condition of the remains when found, the head being severed from the body; the extraordinary care of the prisoner, successful in a measure to conceal all evidence of his crime; his appropriation of the horses and other property taken by him from the deceased as his own, and selling them as such,—these and other facts are hardly consistent with a condition of mind and heart of the prisoner at the time of the crime which reduces it to the low degree of felonious homicide for which he stands convicted, and are not calculated to recommend him to the mercy of the court.

The judgment of the district court is affirmed.

RES GESTÆ, WHAT DECLARATIONS ARE PART OF: See full note on this subject appended to *People v. Vernon*, *ante*, p. 49.

EXPERT TESTIMONY AND OPINIONS OF WITNESSES.—An extensive treatment of this subject will be found in the note to *Hammond v. Woodman*, 66 Am. Dec. 228. As to the admissibility of the opinions of physicians, see *Matteson v. New York Central R. R. Co.*, 91 Id. 67, and note 71. The principal case is cited to the point that the opinions of medical men who are shown to be experts, as to the instrument producing wounds or disease, and the nature and consequences of the wounds, or the causes of the disease, are competent evidence in the prosecution for homicide: *State v. Morphy*, 33 Iowa, 272.

IDENTITY OF CORPUS DELICTI IN CASES OF HOMICIDE: See note to *State v. Williams*, 78 Am. Dec. 255-257; *Commonwealth v. Webster*, 52 Id. 711. Evidence that a person alleged to be killed was seen alive after the time when the killing is charged to have occurred is competent, but to warrant an acquittal, it must be made out by satisfactory proof: *Commonwealth v. Webster*, *supra*.

DEGREE OF EVIDENCE NECESSARY TO ESTABLISH ALIBI: See *French v. State*, 74 Am. Dec. 229, and note 233. The principal case is cited to the point that an *alibi* need not be established by such a preponderance of the evidence as to "fully satisfy" the jury, a bare preponderance at most is all that is required: *State v. Hardin*, 46 Iowa, 629; *State v. Northrup*, 48 Id. 587; *State*

v. *Kline*, 54 Id. 186. But an *alibi* cannot be presumed, and must be established by at least a preponderance of evidence, the burden of proof resting upon the defendant: *State v. Red*, 53 Id. 71; *State v. Northrup*, *supra*; *State v. Hamilton*, 47 Id. 598, citing the principal case.

EVIDENCE OF PRIOR STATEMENTS OF IMPEACHED WITNESS in corroboration of his testimony: See *Munson v. Hastings*, 36 Am. Dec. 345; *State v. George*, 49 Id. 392, and notes; and see also the note to *Weatherford v. Weatherford*, 56 Id. 219, upon corroboration by statements out of court in bastardy proceedings. The declarations of a witness made soon after an occurrence to which he testifies, agreeing with his statements on the trial, are not admissible for the purpose of strengthening his testimony. Such declarations would, however, be admissible where it was claimed that on account of the relation of the witness to the cause or parties, he designedly gave false testimony, and the declarations are shown to have been made before such relation existed: *Boyd v. First Nat. Bank*, 25 Iowa, 257, citing the principal case.

FISHER v. ANDERSON.

[25 IOWA, 2A.]

PROMISSORY NOTE IS NOT USURIOUS WHICH STIPULATES that the principal shall draw more than the legal rate of interest from date, if the note be not paid when due, unless it appears that interest had been included in the face of the note.

ACTION brought to recover upon a promissory note, and "if not paid when due, with interest at ten per cent from date." The note was dated March 8, 1867, due January 1, 1868. The defendants offered to let judgment go for the amount of the note, with interest at six per cent from the maturity of the note. The court found that the plaintiff was entitled to more than was thus offered, and the defendants appealed. Other facts appear in the opinion.

T. Corbett, for the appellants.

Thompson and Davis, for the appellee.

By Court, WRIGHT, J. It will be seen that there was no evidence that interest to the 1st of January, 1868, was included in the note, and that ten per cent was agreed to be paid on the amount thus computed from the date of the transaction or loan. Upon its face the contract seems to be fair, and not unusual. Whether the ten per cent be called a penalty or interest, the note would not be tainted with usury, for by the statute it is competent to contract for and take ten per cent. If defendant was at the date of the note owing \$170.10, then under the law plaintiff could take his promise

to pay ten per cent from that date, having the payment of the interest so reserved depend upon the prompt payment of the principal at maturity. And upon the face of the note this is all there is of the case.

Cutler v. How, 8 Mass. 256, cited by appellants, so far from teaching a contrary rule, plainly upholds this contract. Defendant, by paying the note before or at its maturity, might have avoided the payment of the ten per cent, and it was as competent for him to undertake to pay this amount for his failure to make prompt payment as to pay six per cent. For when the contract is in writing, it is no more usury to reserve ten than six per cent.

So if "I loan to one a hundred pounds for two years, to pay for the loan thereof thirty pounds, and if he pay the principal at the year's end, he shall pay nothing for interest, this is not usury, for the party hath his election, and may pay it at the first year's end, and so discharge himself": *Roberts v. Tremayne*, Cro. Jac. 507. And says the text (3 Parsons on Contracts, 116), an agreement to pay more than interest for not paying a debt is not usurious, because the debtor may relieve himself by paying the debt, with lawful interest; and even if he incurs the penalty, this may be reduced to the actual debt. As the record stands in this case, the actual debt was just what is claimed by plaintiff.

In *Gambril v. Doe*, 5 Blackf. 140 [44 Am. Dec. 760], the mortgage reserved ten per cent, and provided that the land might be exposed to sale "if such principal and interest be not paid at the time the same shall become due, to satisfy said principal, and principal and interest, with five per cent damages and all costs. It was held that the ten per cent was the lawful rate of interest, and as to the five per cent damages, it was entirely optional with the mortgagor whether he would pay the same or not, that they were in the nature of a penalty for the want of punctuality in paying the debt when due, and that this saved the contract from the taint of usury. And see this doctrine expressly recognized and fully discussed in *Gower v. Carter*, 3 Iowa, 244 [66 Am. Dec. 71]; also *Shuck v. Wight*, 1 G. Greene, 128; *Parvin v. Hoopes*, Morris, 294; *Wilson v. Dean*, 10 Iowa, 432.

Now, if it appeared that interest had been included in the note, and that plaintiff was seeking to recover ten per cent thereon as well as on the principal from its date, we would have the case discussed by defendant's counsel; and we

should be prepared to hold that the parties could not, by thus liquidating the damages for the mere non-payment of the money, evade the usury statute. Or, if by this construction of the contract, plaintiff, under the name of penalty or otherwise, was reserving more than the legal rate of interest, defendant's position might be maintained. Nothing of this kind appears, however, and the judgment below must stand affirmed.

USURY, AND LAW OF USURIOUS CONTRACTS GENERALLY: *Davis v. Garr*, 55 Am. Dec. 391; *Sylvester v. Swan*, 81 Id. 736, and extended notes thereto; *Musselman v. McElhenny*, 85 Id. 445.

INTEREST WHEN NOT USURIOUS: *Rogers v. Sample*, 69 Am. Dec. 349; *Hale v. Hale*, 78 Id. 490.

RESERVATION IN NOTE THAT INTEREST THEREON SHALL BE PAYABLE SEMI-ANNUALLY IS NOT USURIOUS: *Goodrich v. Reynolds*, 83 Am. Dec. 240.

STIPULATION TO PAY INTEREST FROM DATE OF NOTE, IF NOTE IS NOT PAID AT MATURITY, IS NOT USURIOUS: *Gower v. Carter*, 66 Am. Dec. 71, and note; *Rogers v. Sample*, 69 Id. 349.

USURY, WHETHER IT AVOIDS NOTE IN HANDS OF BONA FIDE PURCHASER: *Ayer v. Tilden*, 77 Am. Dec. 355; *Woodworth v. Huntoon*, 89 Id. 340.

CURL v. WATSON.

[25 Iowa, 85.]

FACT WILL BE DEEMED ESTABLISHED WITHOUT PROOF which is affirmatively alleged both in the petition and answer, although the answer contains also a general denial, and the plaintiff filed a reply in general denial of the allegations of the answer.

EFFECT AS EVIDENCE OF COPIES OF ORIGINAL DEEDS IS NOT DEFEATED by the fact that they are attached to the amended instead of the original petition, and thus introduced, where the agreement was to waive the introduction of original deeds, and consent by the defendant to the admission of copies "attached to the original petition."

IN ORDER TO AVOID COSTS IN ACTION BY MINORS TO REDEEM FROM TAX SALE, tender of the amount due the defendant for taxes paid, and that the tender has been kept good, should be shown.

TAX SALE—AMOUNT NECESSARY TO REDEEM FROM.—In a proceeding to redeem from tax sales, it was found that one of the sales was invalid, while the others were valid: *held*, that the plaintiff should pay the amount of legal taxes paid by the defendant, with interest thereon at six per cent, under the invalid sale, and the statute penalty and interest upon the valid sales, and also the subsequent taxes paid by the defendant.

OWNER OF ANY INTEREST IN REAL ESTATE SUBJECT TO REDEMPTION FROM TAX SALE MAY REDEEM the whole property, and the purchaser may require him to redeem the whole, if any.

SUIT in equity brought by minor plaintiffs to redeem lands from tax sale. The plaintiffs claimed the right, as minors, to redeem after the expiration of three years from the sale, and after the execution of the treasurer's deeds. The decree of the court, based upon the report of the referee, was, that the sales and tax deeds be set aside as to the plaintiffs and the defendants Douglas and Watson, upon the plaintiffs paying them \$81.60 within ninety days from judgment; that the action be dismissed as to said defendants; and that the plaintiffs pay the costs. The plaintiffs appealed. Other facts appear in the opinion.

S. P. Vanatta, for the appellants.

C. H. Conklin, for the appellees.

By Court, COLE, J. 1. The plaintiffs, who are minors, derive their title to the real estate in controversy by descent, the death of their ancestor having occurred before any of the sales for taxes, under which the defendants claim. The petition as amended alleges that the defendants Douglas and Watson claim to have purchased the land at three different sales, and have obtained three several deeds therefor; that the defendant Samuel H. Watson was a member of the firm of Douglas and Watson, and had conveyed a part of the land to the defendant Patrick M. Clayton. Copies of the several deeds were annexed to the original petition, and were afterward detached and annexed to the amended petition.

The defendants, in their answer, deny each and every allegation of the petition as amended, and then aver affirmatively the several facts necessary to a valid sale for taxes, and also that Samuel H. Watson was a member of the firm of Douglas and Watson; that they had conveyed to him all the land in controversy, and he had conveyed a part thereof to the defendant Clayton. To this answer the plaintiff filed a reply in general denial.

Upon the hearing before the referee, as stated in the report, "the defendants waive the introduction of the original exhibits of deeds attached to the original petition in this cause filed. Plaintiffs offer said exhibits in evidence." The referee made the report for the dismissal of the cause as to Samuel H. Watson and Patrick M. Clayton, upon the assumption that there was no showing that Samuel H. Watson was a member of the firm of Douglas and Watson, or that there was any evidence

of the conveyance of the tax title to the property in controversy to them. The first of these assumptions is grounded upon the idea that the plaintiff's allegation that Samuel H. Watson was a member of the firm of Douglas and Watson being controverted by the general denial of defendants' answer, and the like allegation in defendants' answer being controverted by the plaintiffs' general reply in denial, the fact could not be found without proof. And the second is grounded upon the idea that the exhibits showing the tax title to be in Samuel H. Watson and Patrick M. Clayton were annexed to the amended petition, and not "to the original petition in this cause filed," as stated by the referee in his report.

Both of these assumptions rest upon a too narrow and technical construction of the pleadings and evidence as offered, to be sustained under our practice. It was error to dismiss the cause as to said defendants Watson and Clayton.

2. The petition and amended petition both asked that the tax deeds be set aside, and if it should be found that any taxes had been legally assessed upon the lands, that the plaintiffs be permitted to redeem, etc. But there was no averment of tender or offer to pay, nor any money brought into court therefor. On the trial, however, the plaintiffs proved a tender of \$135 to the defendant Samuel H. Watson, and the deposit of that amount with the clerk, which, however, they subsequently and before the trial withdrew. The district court, following the opinion of the referee, taxed the costs of this action to the plaintiffs. In this there was no error. To avoid the costs of the action, the plaintiffs should, at least, have tendered the amount due defendants for the taxes, etc., paid by them, and should have kept the tender good. This they did not do, and were therefore properly taxed with costs.

The referee found the first sale invalid by reason of several parcels or tracts being sold together, while the other two sales were valid. He also found that plaintiffs should pay the amount of legal taxes upon their lands, which defendants had paid under the first sale, and six per cent thereon; and should also pay the statute penalty and interest upon the other sales and subsequent taxes paid by defendants. There was no error in this holding,—certainly none in view of the plaintiffs' prayer in their petition.

3. The plaintiffs are three of the four children left by their father at his decease. They were all then, in 1857, minors, and the plaintiffs still are. The child which did not join was

aged sixteen at her father's death; and she married a month or two thereafter, and is still a *feme covert*. The defendants' counsel, in his argument in this court, asks, in case the judgment of the district court is not permitted to stand, that the plaintiffs be allowed to redeem only their three undivided fourth parts, and not the whole of the property in controversy. It seems to be very well settled that where a party, by reason of owning any interest in the property sold for taxes, has a right to redeem, he may redeem the whole, and the purchaser may require him to redeem the whole, if any: *Blackwell on Tax Titles*, 1st ed., 492-505; *Id.*, 2d ed., 283-289; *Byington v. Rider*, 9 Iowa, 566; *Burton v. Hintrager*, 18 Id. 348; *Adams v. Beall*, 19 Id. 61; *Myers v. Copeland*, 20 Id. 22. As to right of minors to redeem after three years, see *Revision*, 1860, sec. 779; *Laws of 1862*, p. 226. The judgment of the district court will be so modified as to cancel the tax titles of all the defendants, upon plaintiffs paying to the clerk, within ninety days, the amount required to redeem upon the basis fixed by the district court as above, the plaintiffs to pay the costs in the district court, defendants to pay the costs of the appeal.

Reversed.

ANSWER MUST BE TAKEN AS TRUE IN ABSENCE OF EVIDENCE, where it denies the statement in the bill, and avers otherwise: *Paul v. Carver*, 64 Am. Dec. 649.

DEFENDANT CANNOT DENY ALLEGED FACT WHICH HE BELIEVES: *Humphreys v. McCall*, 70 Am. Dec. 621, and see note thereto.

TAX DEED AS EVIDENCE: See *Lacey v. Davis*, 66 Am. Dec. 524, and note 533; *People v. Seymour*, 76 Id. 521, and note 532; *Pleasants v. Scott*, 76 Id. 406; is conclusive against an intruder without color of title: *Wheeler v. Winn*, 91 Id. 186.

TAX DEED, EXCLUSION OF FOR UNCERTAINTY IN DESCRIPTION: *Keane v. Cannovan*, 82 Am. Dec. 738.

CERTIFICATE OF REDEMPTION OF COUNTY TREASURER IS NOT CONCLUSIVE as to the amount to be paid: *Byington v. Bookwalter*, 74 Am. Dec. 279.

ONE CO-TENANT MAY REDEEM WHOLE ESTATE FROM TAX SALE: *People v. Treasurer*, 77 Am. Dec. 433; *Watkins v. Eaton*, 50 Id. 637, and note 641.

REDEMPTION BY CO-TENANT. — Generally speaking, any one having an interest in or lien upon land may redeem: *Gibson v. Crehore*, 5 Pick. 146; *Grant v. Duane*, 9 Johns. 612; *Moore v. Beason*, 44 N. H. 215; *Hoppin v. Doty*, 22 Wis. 621; *Cummings v. Wilson*, 59 Iowa, 14; *White v. Smith*, 68 Id. 313. And one of several co-tenants may redeem for himself and the others, without special authority from the latter: *Gentry v. Gentry*, 1 Sneed, 87; *S. C.*, 60 Am. Dec. 137; *Loomis v. Pingree*, 43 Me. 299; *Halsey v. Blood*, 29 Pa. St. 322. Thus one co-tenant may redeem the whole estate from the purchaser thereof at a sale for taxes, and such purchaser's title is legally extinguished by the redemption so made, and a subsequent tender to him by

the other co-tenant of the amount due on his portion of the estate is of no effect: *Watkins v. Eaton*, 30 Me. 529; S. C., 50 Am. Dec. 637. Not only may a co-tenant redeem the whole estate from a tax sale, but the rule seems to be, as held in the principal case, that the purchaser may require him to redeem the whole, if any: See *Hipp v. Orenshaw*, 17 N. W. Rep. 660 (Iowa). But see *People v. Treasurer*, 8 Mich. 14; S. C., 77 Am. Dec. 433. And the rule is clearly subject to an exception where a right of redemption remains to a tenant in common by reason of the fact that the land was sold when he was a minor. In such case, his right to redeem cannot be denied him, even though his co-tenant's share is past redemption, nor can he be allowed to redeem the whole: *Jacobs v. Porter*, 34 Iowa, 341, 346, citing and explaining the principal case; *Stout v. Merrill*, 35 Id. 47, 60, also citing the principal case. His right to redeem is confined to the extent of his interest in the estate: *Miller v. Porter*, 35 Id. 106; and see *Quinn v. Kenney*, 47 Cal. 147.

Where one co-tenant is obliged to redeem the whole of the common property in order to relieve his own share from encumbrance, he has no right of contribution against the others personally, and his only remedy is by a foreclosure of their interests in the land, if they fail to pay their share: *Lyon v. Robbins*, 45 Conn. 513; *Watkins v. Eaton*, 30 Me. 529; S. C., 50 Am. Dec. 637; they have the option to pay or give up their interests: *Lyon v. Robbins*, 45 Conn. 513. But if one of the tenants in common redeems the common property, he acquires thereby an equitable lien upon the interests of his co-tenants for the payment of their several proportions of the money paid by him in effecting the redemption; and a court of equity will enforce such lien by decreeing that in default of payment, the interests of the co-tenants be sold, and the proceeds applied to the extinguishment of the lien: *Calkins v. Steinbach*, 66 Cal. 117; S. C., 4 Pac. Rep. 1103.

The doctrine has been thus briefly stated: "If tenants in common of land have mortgaged it for their joint debt, either of them, on paying the mortgage debt prior to a sale on foreclosure, has a claim against his co-tenant for contribution, capable of being enforced in a personal action, and a lien to secure the same upon his co-tenant's interest in the land. And after a sale on foreclosure for the full amount due, if one tenant redeems from the sale, he still has an equitable lien upon his co-tenant's interest for that portion of the redemption money properly chargeable thereon, but no personal claim against his co-tenant, or against his estate after his decease": *McLaughlin v. Estate of Curtis*, 27 Wis. 644. So a tenant in common who relieves the estate from the encumbrance of taxes has a lien upon his co-tenant's interest for the taxes paid: *Davidson v. Wallace*, 53 Miss. 475; *Allen v. Poole*, 54 Id. 334; *Harrison v. Harrison*, 56 Id. 174. And where taxes are paid by one tenant in common, it is held that he may compel his co-tenant, by an action at law, to contribute his just proportion: *Kites v. Church*, 142 Mass. 586; *Searls v. Sellew*, 28 Iowa, 508; *Dickinson v. Williams*, 11 Cush. 258. The holder of any right in lands, legal or equitable, perfect or inchoate, may redeem from a tax sale: *Rice v. Nelson*, 27 Iowa, 148; *Cummings v. Wilson*, 59 Id. 16; *Woodward v. Campbell*, 39 Ark. 580; *Sanders v. Ellis*, 42 Id. 215. But a redemption from a tax sale by one of several co-tenants inures for the benefit of all, and the redeeming tenant cannot assert any rights thereunder as adverse to the other co-tenants: *Lomax v. Gindell*, 117 Ill. 527; and see *Maul v. Rider*, 51 Pa. St. 377; *Davis v. King*, 87 Id. 261; *Flinn v. McKinley*, 44 Iowa, 68; *Conn v. Conn*, 58 Id. 747; *Tice v. Derby*, 59 Id. 312; *Muthersbaugh v. Burke*, 6 Pac. Rep. 252 (Kan.); *Minter v. Durham*, 13 Or. 470; *Elston v. Piggott*, 94 Ind. 14; *Bissell v. Foss*, 114 U. S. 252, 259. The relation between co-tenants is couli-

dential in its nature, raising an obligation on the part of each to sustain, or at any rate not to assail, the common interest. This obligation disables each to buy in and secure to his own exclusive benefit, without the consent of the others, any outstanding encumbrance or adverse title. And if he does buy in such encumbrance or adverse title, the others are entitled to share in the benefit of the purchase, unless they in some way renounce or unreasonably neglect to assert their right in that behalf: *Van Horne v. Fonda*, 5 Johns. Ch. 389; *Bracken v. Cooper*, 80 Ill. 221; *Wilton v. Tazewell*, 86 Id. 29; *Moore v. Woodall*, 40 Ark. 42; *Boskowitz v. Davis*, 12 Nev. 446; *Brown v. Homan*, 1 Neb. 448; *Picot v. Page*, 26 Mo. 398, 421.

The redeeming tenant is entitled to contribution from his co-tenants; and on the other hand, the latter are entitled to an opportunity to contribute their proportion of the expense in effecting a redemption, thus enabling them to participate in its benefits: *Calkins v. Steinhach*, 66 Cal. 117; *Hipp v. Crenshaw*, 17 N. W. Rep. 660 (Iowa); *Weare v. Van Meter*, 42 Iowa, 128; S. C., 20 Am. Rep. 616; *Fallon v. Chidester*, 46 Iowa, 588; S. C., 26 Am. Rep. 164; *Gossom v. Donaldson*, 18 B. Mon. 230; *Tisdale v. Tisdale*, 2 Sneed, 596; *Watson's Appeal*, 90 Pa. St. 426; *Kean v. Connolly*, 25 Minn. 222; *Newbold v. Smart*, 67 Ala. 326; *Davidson v. Wallace*, 53 Miss. 475. Thus the plaintiff and defendant, and others, were co-tenants by descent from a common ancestor of certain real estate on which was a mortgage. The defendant, without the others' consent, agreed with the holder of the mortgage that the latter should foreclose, bid in the property, and after expiration of the time to redeem, should convey it to the defendant on payment of the amount due on the mortgage and costs of foreclosure, which agreement was carried out. Held, that the defendant's paying the money, and receiving the conveyance, was in effect but a redemption, and that his co-tenants were entitled to share in the benefits of the transaction on making contribution to the expense: *Oli-ver v. Hedderly*, 32 Minn. 455. So one of two tenants in common of mortgaged premises, "for the purpose of effecting a redemption" from a foreclosure sale thereof, and after an "understanding" with his co-tenant that he would make such redemption, paid the amount necessary to redeem, and took to himself an assignment of the purchaser's certificate of sale; and it was held that as to the co-tenant, equity would treat the transaction as a redemption, and not as divesting the co-tenant of his estate: *Holterhoff v. Mead*, 29 N. W. Rep. 675 (Minn.).

THE PRINCIPAL CASE IS EXAMINED in *Jacobs v. Porter*, 34 Iowa, 345, 346, and is overruled to whatever extent it conveys the idea that a minor owning a part may redeem the whole; and so, in *Stout v. Merrill*, 35 Id. 60. It is cited to the point that no tender of the amount to which the holder of a tax deed was entitled upon redemption ever having been made to him, the costs of an action to set aside the deed should be paid by the plaintiff, in *Corning Town Co. v. Davis*, 44 Iowa. 634.

FRANCIS v. DUBUQUE AND SIOUX CITY R. R. Co.

[25 IOWA, 60.]

RAILROAD COMPANY IS LIABLE ONLY AS WAREHOUSEMAN after depositing goods in its warehouse at the end of transportation, and is not responsible for their loss in the absence of negligence.

LIABILITY OF RAILROAD COMPANY AS COMMON CARRIER OF FREIGHT ENDS, and that of warehouseman begins, when the goods have arrived at the point of destination, and are there deposited in the company's warehouse to await the convenience of the consignee. But if the goods should arrive out of time, and the company failed to notify the consignee, its liability as a common carrier might be extended.

ACTION to recover the value of certain goods lost by fire in the defendant's warehouse. The goods were shipped on the defendant's cars for carriage from Chicago to Ackley. They arrived at the latter place in the evening, and were unloaded and safely placed in the defendant's warehouse. During the night, the warehouse was burned, and all the said goods consumed. The plaintiff resided near the warehouse, and had no notice of the arrival of the goods, nor was it the custom of the defendant to give such notice. The defendant had established the following rules and conditions relative to the transportation of freight: "3. Nor will they hold themselves liable for damages by fire, or as common carriers, for any article after its arrival at its place of destination on this road." "13. Property must be removed within two days after it is unloaded from the cars at the place of delivery. If not so removed, storage will be charged at the rates named below, or, at the option of the company, it will be transferred to a private warehouse, and stored at the expense of the owner. . . . Consignees residing at a distance from the station will be allowed from five to ten days' storage free." Upon the facts above stated, the court found for the plaintiff, and the defendant appealed.

Allison, Crane, and Rood, for the appellant.

E. W. Eastman, for the appellee.

By Court, WRIGHT, J. There is no question of negligence or the want of proper care in this case. The real point is, whether under the facts stated defendant is liable and is to be held as a common carrier, or whether this relation had ceased at the time of the loss, and that of warehouseman commenced. If the latter was the relation, then there can be no pretense of liability; if the former, it is not denied.

In other words, the defendant's position, and that which counsel undertake to maintain, is, that when the goods were unloaded from the cars and safely deposited in the warehouse, the liability as common carrier ceased; that after this the company was only subject to the liability of a warehouseman, and as such was not responsible for the loss in the absence of negligence. And this position plaintiff denies, insisting that defendant was still an insurer of the goods, notwithstanding they had arrived at their destination and been transferred from the cars to the warehouse. And thus we have the very question which was referred to but not decided in *Angle v. Mississippi and Missouri Railroad Co.*, 18 Iowa, 555, and which is thus far an open question in this state.

The question is an important one, and has received that attention which the magnitude of the interests involved demands. It relates to merchandise transported by the carrier, and not to the baggage of passengers, nor to the peculiar liabilities of the company as a carrier of persons. It must be viewed in reference to the growth and increase of the business of railroads in this and other states, and the rights of consignees in connection with the untold amount of property annually transported on their lines. Long and well established principles must not be overlooked. And though it should occur that the liabilities of a common carrier and warehouseman should unite in the same company, we are not to confound the law governing each, but must declare the rules applicable precisely as though the warehouseman and carrier were different persons.

Now, suppose the warehouse, in this instance, had been owned by a third person, and defendant had announced the rules and regulations referred to in the statement of the case, and with a knowledge of which plaintiff, we may remark, made his contract to have his goods carried, could there be any fair room for claiming that the company would be liable as common carriers? It seems to us that the transit in such a case would be at an end when the goods were unloaded and placed in the warehouse. If not, when would it be? If it continues for four or eight hours after the deposit, then why not twenty-four or forty-eight? And if thus at an end if the goods were left with a third person as a warehouseman, so it would be when the goods are transferred from the defendant's cars to its warehouse. There is no liability to carry them

another rod or foot. They are safely housed at their place of destination, and after this the company would only be liable for the want of proper care.

This was all the defendant agreed to do. The goods were transported safely from the place of shipment to that of delivery. If plaintiff had been ready to receive them, there would have been no necessity for storing them. Not being there, the contract, as well as reason and the law, directed that the goods should be put into a safe and secure place, there to be kept, according to the rules of the company, until he could take them away. Nor do these rules, when properly understood and construed, warrant appellee's position that the company agreed to be held as a common carrier for two days after the arrival of the goods. A part of the consideration which plaintiff received, or was entitled to, by the terms of his contract with the company, was, that his goods might remain in store for two days after they were unloaded from the cars, without charge. It was just as competent for the company to say that storage would be charged from the time the goods should be deposited in the warehouse. The regulation as it stands is probably for the benefit of both parties. It is certainly so as to plaintiff: Story on Bailments, sec. 446.

Then, again, the whole contract, or all the rules, must be read in the light of each other; and as thus read, it is very plain, from the third rule, that the company did not undertake to hold itself liable as a common carrier for goods after their arrival at their place of destination on the road. Indeed, it is declared as plainly and distinctly as it can be by words that it will not be liable after that time. Looking at the thirteenth rule in the light of the third, and what is meant is, that the company will store the goods for two days without charge. Not that it will be held liable during this forty-eight hours as a common carrier, but as a warehouseman, without further charge than that included or covered by the amount paid, or agreed to be paid, for freight.

The view above taken of the rights of parties under such contracts commends itself for its certainty. To say that the responsibility of the carrier continues for one hour after the goods are stored is, on principle, no more reasonable than to say that it shall continue for six, twelve, or twenty-four. Where shall be the dividing line? Where shall the liability of the one relation cease and the other commence, if not when the carrier, as such, has fulfilled its contract, and turned the

goods over to a bailee of a different character? If not then, at what precise time after the goods are thus deposited shall it take place? Then, the very nature of the business transacted—the inability of the company, by its means of transportation, to deliver the goods at any other place than its depot or freight-house—shows the propriety and reasonableness of the rule. This, too, is known to the owners of freight. They expect to get their goods at a given depot, where the goods can be safely unloaded and deposited. As a common carrier, it is employed to transport goods from one point or place to another. It is not reasonable to suppose that the parties contemplated that the company should be treated as a carrier after the carriage was completed. Not only so, but the rule treating the common carrier as an insurer of goods is a strict one; and while its policy is, of course, not to be questioned, nor we in the least disposed to lessen its rigor, it ought not to be extended beyond cases clearly coming within its meaning and spirit.

That this conclusion is well sustained by the authorities is capable of abundant demonstration. Thus, by the highest authority on the law of bailments in this country, it is said that when the goods have arrived at the place of their fixed destination, and are there deposited in the carrier's warehouse to await the owner's convenience in sending for them, his duty as carrier ends, and his duty as warehouseman commences: Story on Bailments, sec. 448. In support of the doctrine, he cites *In re Webb*, 8 Taunt. 443; 2 Kent's Com. 769; and see also *Garside v. Trent and Mersey Nav. Co.*, 4 Term Rep. 581; *Thomas v. Boston & P. Co.*, 10 Met. 472; *Platt v. Hibbard*, 7 Cow. 497; *Roberts v. Turner*, 12 Johns. 232 [7 Am. Dec. 311]; *Brown v. Denison*, 2 Wend. 593; *Hyde v. Trent and Mersey Nav. Co.*, 5 Term Rep. 394; *Stevens v. Boston R. R. Co.*, 1 Gray, 277; *Norway Plains Co. v. Boston etc. R. R.*, 1 Id. 263 [61 Am. Dec. 423].

We are of course aware that there are cases which take the opposite view of the question. Among them is the well-considered one of *Moses v. Boston etc. R. R.*, 32 N. H. 523 [64 Am. Dec. 381], in which many of the authorities on the other side, and especially that of *Norway Plains Co. v. Boston etc. R. R.*, *supra*, are referred to and their correctness denied. And see *Smith v. Nashua etc. R. R. Co.*, 27 N. H. 86 [59 Am. Dec. 364]; *Wood v. Crocker*, 18 Wis. 345 [86 Am. Dec. 773]; *Alabama etc. R. R. Co. v. Kidd*, 29 Ala. 221; *Michigan Central R. R. Co. v.*

Ward, 2 Mich. 538, which, however, rests upon their statute; *Rome R'y Co. v. Sullivan*, 14 Ga. 277. This view, too, is regarded as the better one by Judge Redfield: 2 Law of Railways, 55, 62. In this conflict we have felt inclined to adopt the rule which has the most certainty, and is by no means unfair or unreasonable. That it has the sanction of the ablest writers and judges has already been shown. We cite further, as directly in point, *Jackson v. Sacramento Valley R. R. Co.*, 23 Cal. 268; *Illinois Cent. R. R. Co. v. Alexander*, 20 Ill. 23; *Porter v. Railroad Co.*, 20 Id. 407; also *New Albany etc. R. R. Co. v. Campbell*, 12 Ind. 55; and see the authorities collected and discussed in note to *Michigan etc. R. R. Co. v. Biven*, 13 Id. 269; *Neal v. Wilmington R. R. Co.*, 8 Jones, 482.

As to the necessity of notice to the consignee, Mr. Redfield says the cases have settled the question that the carrier by railway is neither bound to deliver the goods personally, nor to give notice of their arrival: 2 Redfield on Railways, 52; and see *Angle v. Mississippi etc. R. R. Co.*, 18 Iowa, 560, and cases cited. If the matter depends upon custom and usage, then notice was not necessary in this case, for it appears that it was not the custom to give such notice.

It is proper to say, in conclusion, that the goods arrived on time, and that there is no ground for the thought that the consignee was misled, or that he did not know when his goods would arrive. Should a case arise where the goods arrived out of time, and especially where the consignee had been active in endeavoring to find them or to ascertain the probable time of their arrival,—and where the company failed to give notice,—we should hesitate before holding that a deposit in the warehouse was an end of the carrier's liability.

We also remark that this case is ruled without giving any weight to the rules and conditions attached to the contract of affreightment, and to which we have before referred. We have looked alone at the common-law rights and liabilities of these parties. The regulations, it is sufficient to say, and as heretofore intimated, do not continue defendant's liability as a common carrier beyond the time of the deposit of the goods in the warehouse.

Reversed.

LIABILITY OF RAILROAD COMPANY AS WAREHOUSEMAN FOR LOSS OF BAGGAGE: *Warner v. Railroad Co.*, 92 Am. Dec. 389.

DUTY OF COMMON CARRIER BY RAILWAY AS TO DELIVERY OF GOODS: *Blumenthal v. Brainerd*, 91 Am. Dec. 350, and cases collected in note 363.

WHEN DUTY OF COMMON CARRIER AS SUCH TERMINATES, AND THAT OF WAREHOUSEMAN BEGINS: *Wood v. Crocker*, 86 Am. Dec. 773, and note; *Bansmer v. Railroad Co.*, 87 Id. 367; *McMillan v. Michigan etc. R. R. Co.*, 93 Id. 203.

THE PRINCIPAL CASE IS CITED to the second point stated in the *syllabus*, in *Mohr v. Chicago etc. R. R. Co.*, 40 Iowa, 581.

REED v. HARPER.

[25 IOWA, 87.]

IT IS NO DEFENSE TO ACTION OF SLANDER that the defendant was intoxicated at the time of speaking the slanderous words.

ACTION for slander, in which the verdict and judgment were for the plaintiff. The defendant appealed. The facts appear in the opinion.

I. M. Preston and Son, and Isaac Cook, for the appellant.

Thomas Corbett, Henry O'Connor, N. M. Hubbard, and R. D. Stephens, for the appellee.

By Court, COLE, J. The defendant is charged to have spoken of the plaintiff, "He is a damned thief, he stole from me"; and also, "He swore to a lie at Marion, and I can prove it." The petition avers that, before the speaking of the words last specified, there had been a suit pending in the district court of Linn County, at Marion, between these parties, wherein the plaintiff was sworn and testified as a witness. The evidence showed the speaking of the words and the pendency of the suit. The defendant testified that at the time he was charged to have spoken the words, "he was for the first time in a fix that he did not know what he was about, and that he had no recollection of what was said or took place there, or how he got home."

The only point insisted on in argument is, that the court should have instructed the jury that if they believed from the evidence that the defendant was so intoxicated at the time he spoke the words that he did not know what he was about, the plaintiff could not recover. The court did not so instruct, but did instruct the jury that it is no sufficient cause to defeat the action if it appears that the defendant was drunk when he uttered the words, if he did utter them; but in considering the amount of the verdict, it was their duty to consider all the facts and circumstances attending and surrounding

the speaking of the words. In this the court did not err. Drunkenness will not excuse a slander: *McKee v. Ingalls*, 4 Scam. 30.

As to the other errors assigned, but not insisted on in argument, we may say that we have examined them *seriatim*, and find no error to defendant's prejudice.

Affirmed.

VOLUNTARY INTOXICATION WILL NOT EXCUSE CRIME COMMITTED BY ONE WHILE ACTING UNDER ITS INFLUENCE: *State v. John*, 49 Am. Dec. 396; *Carter v. State*, 62 Id. 539; see *Golliher v. Commonwealth*, 87 Id. 493; *Keenan v. Commonwealth*, 84 Id. 414; *People v. King*, 87 Id. 95.

HODGSON v. LOVELL.

[25 IOWA, 97.]

IT IS NO MORE NECESSARY UNDER IOWA RECORDING ACT TO ENTER NAMES OF BOTH HUSBAND AND WIFE in the index of a conveyance of the homestead, in order to impart notice, than of any other real estate wherein both join. Nor is it necessary that the index should contain a full description of the premises.

SUIT in equity to foreclose certain mortgages. The plaintiff had judgment in his favor, and part of the defendants appealed.

Monroe and Deery, for the appellants.

Griffith and Knight, for the appellee.

By Court, COLE, J. The only question made in this case is as to the sufficiency of the index of plaintiff's mortgages to impart notice to the appellants, who are subsequent mortgagees of the same property. The question can be most perspicuously stated in two subdivisions: 1. The mortgages were made by husband and wife, and embraced the homestead, the legal title to which was held by the husband. The index contained the name of the husband only as grantor. The point made is, that since the wife has an interest in the homestead, and both husband and wife must join in order to make a valid conveyance, the index should show the names of "the respective grantors arranged in alphabetical order," as provided in section 2224 of the Revision of 1860. It is no more necessary under our law to enter the names of both husband and wife in the index of a conveyance of the homestead, than of any other real estate wherein both join. The

point made, so far as relates to this subdivision, has in effect been decided by this court in *Jones v. Berkshire*, 15 Iowa, 248 [83 Am. Dec. 412], where it was held that an index in the name of the husband, of a conveyance of the real estate of the wife, where both joined in the deed, was sufficient to impart notice. With that decision we are content, and thereon affirm the ruling of the district court on that branch of this case.

2. The mortgages of plaintiff contained a description by metes and bounds of a part of mineral lot 178. The index did not contain this description, but only "part of mineral lot 178, in Dubuque County, Iowa, containing two and forty-four hundredths acres." The point made herein is, that since the particular description was not given in the index so as to show what part of the lot was mortgaged, no constructive notice was imparted thereby. This point, also, has in effect been decided by this court against appellant: *Calvin v. Bowman*, 10 Iowa, 529; *Bostwick v. Powers*, 12 Id. 456; *White v. Hampton*, 13 Id. 261; *Barney v. Little*, 15 Id. 527.

Affirmed.

DESIGN OF REGISTRATION ACT IS TO GIVE CONSTRUCTIVE NOTICE: *Chamberlain v. Bell*, 68 Am. Dec. 260; *Ely v. Wilcox*, 91 Id. 436, and note 441.

INDEX TO RECORD OF DEED IS NOT ESSENTIAL to make the record effective as constructive notice: *Green v. Garrington*, 91 Am. Dec. 103, and extended note 106, treating of defects in registration of conveyances, and the effect thereof.

THE PRINCIPAL CASE IS FOLLOWED in *Peirce v. Weare*, 41 Iowa, 381, holding that it was sufficient to impart constructive notice, where the index to the record of a deed gave, for a description of the property, "parts of sections 28 and 29: See record."

STATE v. MOORE.

[25 IOWA, 128.]

IN CASE OF HOMICIDE, MALICE MAY BE IMPLIED from any unlawful act dangerous to life, committed without lawful justification.

CRIME OF MURDER IS ESSENTIALLY SAME UNDER IOWA STATUTE AS AT COMMON LAW, and death caused by an unlawful attempt to procure an abortion is murder, although there was no intent to cause the death of the woman.

IT IS MURDER IN SECOND DEGREE, UNDER IOWA STATUTE, to cause death in the procurement of a willful abortion; and in a prosecution therefor, it is error to instruct the jury that the defendant may be convicted of manslaughter.

IMPEACHING EVIDENCE — TIME OF OBJECTING. — Where, in a criminal prosecution, the defendant introduces witnesses to impeach certain witnesses

sworn by the state by attacking their general character, the state may in turn introduce witnesses to attack the character of the impeaching witnesses of the defense, *semble*. At all events, objection to the admissibility of such evidence must be made before it is admitted, and cannot be made afterwards.

WIFE OF ACCOMPLICE IS COMPETENT WITNESS in a criminal prosecution, and the weight of her testimony is for the jury.

INDICTMENT for murder in second degree, charging, in substance, that the defendant, by means of medicines administered and instruments used to and upon one Mrs. Grant, with intent to produce and procure an abortion, she being then quick with child, caused her death, etc.; and alleging that said medicines and instruments were used by the defendant when they were not necessary to preserve the life of the woman, and with the specific intent to produce an abortion, and that death ensued therefrom; but it was not alleged that the defendant used these means with the intent to cause the death of the woman. Demurrer to the indictment, upon the ground that the offense charged was not murder. It was shown upon the trial that the deceased, Mrs. Grant, in company with her husband, were found at the residence of one Bowman, and the evidence tended to show that they were there in virtue of a preconcerted arrangement to that effect, the parties thereto being Grant, Bowman, and the defendant, Dr. Moore, who was a practicing physician; and this distinctly appeared from the testimony of Bowman, who gave evidence for the state, though jointly indicted with the defendant and Grant. After the arrival of Grant and his wife at Bowman's, Dr. Moore was sent for or appeared, and Bowman's wife testified that when he came he gave Mrs. Grant "a dose of medicine, and after that he used an instrument." Labor pains afterwards came on, followed by convulsions; a still-born child was delivered; in a few days the death of Mrs. Grant occurred, and Bowman, Grant, and Moore fled. Moore was afterwards arrested and brought to trial. Mr. and Mrs. Grant had been married about two months, and the evidence justified the inference that the object of the abortion, to which it did not appear that she was opposed, was to conceal from the public the fact that the child was begotten out of wedlock. The defendant was convicted of murder in the second degree, and was sentenced accordingly. He appealed.

Henry O'Connor, attorney-general, for the state.

B. J. Hall, for the defendant.

By Court, DILLON, C. J. 1. The leading question made by the defendant's counsel is, that conceding the defendant gave Mrs. Grant medicines and used instruments purposely to produce an abortion, yet if her death happened therefrom when not intended or contemplated by him, this is not murder, unless it was done by assault or against her will. Substantially this question is presented by the demurrer to the indictment, by the instructions given and refused, and by the motion for a new trial.

Refusing to charge in conformity with the defendant's proposition as above stated, the court, on its own motion, instructed the jury as follows: "To attempt to produce a miscarriage, except when in proper professional judgment it is necessary to preserve the life of the woman, is an unlawful act. It is known to be a dangerous act, generally producing one and sometimes two deaths,—I mean the death of the unborn infant and the death of the mother. Now, the person who does this is guilty of doing an unlawful act. If the death of the woman does not ensue from it, he is liable to fine and imprisonment in the county jail (act March 15, 1858, Revision, sec. 4221); and if the death of the woman does ensue from it, though there be no specific intention to take her life, he becomes guilty of the crime of murder in the second degree. The guilt has its origin, in such cases, in the unlawful act which the party designs to commit, and if the loss of life attend it as incident or consequence, the crime and guilt of murder will attach to the party committing such an unlawful act."

We have quoted the court's language in order to say that it has our approval as being a correct statement of the law of the land. But it is due to the defendant's counsel,—whose argument against the correctness of the propositions stated by the court was so distinguished for its fairness, acumen, and ability,—to notice, and briefly to answer, his objections to this view.

The defendant's counsel concedes that, tested by the common-law rules, the doctrine of the court's charge is correct. In his written brief he says: "It is conceded that at common law the act of procuring an abortion resulting in the death of the mother is murder." But he contends that under the statutes of the state the doctrine does not apply.

In the outset, he calls attention to the fact that the criminal code of the common law has no existence in Iowa; that

is, that in Iowa no act, though indictable at common law, can be punished as a crime, unless the criminality of such act has been declared or recognized by the statute: *Estes v. Carter*, 10 Iowa, 400. This is followed by the proposition that the act of procuring an abortion was not a criminal offense until made so by the statute of March 15, 1858, reprinted as section 4221 of the Revision: See *Abrams v. Forshee*, 3 Id. 278 [66 Am. Dec. 77]; *Hatfield v. Gano*, 15 Id. 177.

The deduction drawn by him from the above is, that until the statute of 1858, the act of procuring an abortion was not unlawful, because not specifically made criminal by statute, and not "being unlawful, if death ensues therefrom, it is neither murder nor manslaughter."

He then admits that if the law of murder, as contained in the Revision (sections 4191-4194) had been enacted at the same time that the law of March 15, 1858 (Revision, sec. 4221) was passed, or if the statute on the subject of murder had been passed after the act of 1858 (which made criminal the willful procuring of an abortion), that the doctrine of the court's charge would have been correct.

But the statute defining and punishing murder was passed in 1851, and does not, it is argued, blend with the subsequent statute of 1858.

The conclusion from these premises is, that prior to 1858 it would not have been murder, under sections 4191 and 4193, to have willfully procured an abortion, though the death of the woman was thereby caused, and that the subsequent passage of the act of 1858, which says nothing about murder, cannot make that murder which was not so before. This, briefly stated, is believed to be a fair synopsis of the counsel's argument.

Our view is this: our statute defines murder in the language of the common-law definition of that offense: Compare Revision, sec. 4191, and 4 Bla. Com. 195.

As at common law, malice, express or implied, is the essential and distinguishing element of murder. Taking sections 4191 and 4193 together, the proper construction is, that what would be regarded as murder in a common-law court would be murder under our statute. Section 4192 does not extend or abridge the field of murder, but declares certain specified kinds of homicide to be murder in the first degree, and the next section declares all other kinds of murder (that is, all murder as defined by section 4191) to be of the second degree.

It will be observed that manslaughter is not defined at all, but simply made punishable, and the limits of the punishment fixed: Revision, sec. 4199. It follows that we are remitted to the common law to ascertain what manslaughter is, and it seems also necessarily to follow that what would be regarded in a common-law tribunal as manslaughter would be manslaughter in this state under our statute.

Inasmuch, therefore, as it is conceded that, at common law, the act charged upon the defendant is murder, the same act is murder in Iowa, and would have been prior to the passage of the act of 1858.

We grant that the present is not a case of express, but of implied, malice. In case of homicide, the settled doctrine of the common law is, that malice may be implied from unlawful acts dangerous to life, committed without lawful justification: 1 Bishop's Crim. Law, sec. 263; Foster on Homicide, 261; *Ann v. State*, 11 Humph. 159; *Rex v. Martin*, 3 Car. & P. 211; *Commonwealth v. Parker*, 9 Met. 263-265 [43 Am. Dec. 396], *per Shaw*, C. J.

The fundamental proposition of the defendant's argument is, that in Iowa malice cannot be implied from the doing of any act whatever, no matter what its tendency, unless such act is expressly made a crime by statute.

It would result from this that if there was no statute in Iowa forbidding persons from putting an obstruction on a railroad track, and one were willfully and purposely put there, causing death, the party doing this act (if he did not intend to produce death) could not be convicted of murder, for the reason that malice (in Iowa) cannot be implied from an act not made unlawful by statute.

In this state, we have no statute specifically forbidding a person in a crowded city from throwing a heavy and dangerous beam from a high building, likely to injure and kill passers-by.

At common law, if this be done and death happen, the law would imply malice. But in Iowa, under the doctrine contended for, the party doing an act evincing such an utter and wanton disregard of moral and social duty would not be guilty, even though death be caused thereby, of murder, or even manslaughter. These are put by way of illustrations of the consequences of the doctrine maintained by the counsel.

The common law is distinguished, and is to be commended, for its all-embracing and salutary solicitude for the sacred-

ness of human life and the personal safety of every human being. This protecting, paternal care, enveloping every individual like the air he breathes, not only extends to persons actually born, but, for some purposes, to infants *in ventre sa mere*: 1 Bla. Com. 129.

The right to life and to personal safety is not only sacred in the estimation of the common law, but it is inalienable. It is no defense to the defendant that the abortion was procured with the consent of the deceased.

The common law stands as a general guardian holding its ægis to protect the life of all. Any theory which robs the law of this salutary power is not likely to meet with favor. Certain it is, that a doctrine leading to such results as these above instanced cannot be sound, and is not defensible.

We hold, therefore, that, in cases of homicide, malice may, as at common law, be implied from any act unlawful and dangerous in its nature, unjustifiably committed.

The willful and unnecessary procurement of an abortion is an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal to the child. It is abhorrent to all our notions of sound morality and to all the precepts of our holy religion.

Nearly two hundred years ago Lord Hale laid down the law as follows: "If a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder; for it was not to cure her of a disease, but unlawfully to destroy the child within her; and therefore, he that gives a potion to this end must take the hazard, and if it kills the mother, it is murder": 1 Hale P. C. 429, 430. See also *Tinkler's Case*, cited in 1 East P. C., c. 5, sec. 16, p. 264, and *Commonwealth v. Keeper etc.*, 2 Ashm. 227, directly in point; Foster on Homicide, 261; *Ann v. State*, 11 Humph. 159; *Commonwealth v. Parker*, 9 Met. 263-265 [43 Am. Dec. 396], per Shaw, C. J.

And such is the law to-day and in Iowa. Thus to hold the law to be is not laying a snare for the physician, since his conscience and the sages of that useful and learned profession concur in condemning the practice. By none has the guilt of the offense been more earnestly and persuasively portrayed, and its too great prevalence lamented, than by eminent medical writers and teachers.

Under the foregoing view, the willful and unnecessary procurement of an abortion resulting in the unintended death of

the woman would have been punishable as murder in the second degree prior to the act of 1858. Of the correctness of this view I entertain no doubt. But instead of resting the decision of the present question upon this ground, or upon it alone, the court think all possible doubt removed by the act of 1858. The act of 1851, being unrepealed, continued to speak in 1858, and still continues to speak; and has the same force and effect as if it had been passed concurrently with or subsequent to the act of 1858. So that if it were true that malice can only be implied from acts legislatively made criminal, we have even in this view all of the conditions of the offense of murder.

2. The charge against the defendant was not negligence and unskillfulness in procuring an abortion under justifiable circumstances, but the willful procurement of an abortion without any necessity for it, whereby death was occasioned.

If death unexpectedly results from such an act, the crime we have seen was at common law murder, and under our statute is murder in the second degree. Under the charge, and under the evidence, the defendant was guilty of murder in the second degree, or of nothing, and hence the court did not err in refusing to say to the jury that they might convict the defendant of manslaughter.

3. The defendant introduced several witnesses to impeach certain witnesses sworn for the state, by attacking their general character. The defendant complains that in rebuttal the state was allowed to introduce witnesses to attack the character of the impeaching witnesses.

As we read the record, the objection that this kind of evidence was incompetent, if made at all, was not made until after the evidence complained of had been admitted. In a case of this kind the party cannot sit silent and wait until the evidence is in, willing to take the benefit of it if it shall chance to be for him, and insist as a matter of right to exclude it if it be against him. But as it is not clear that the objection was not made in time, we hold, also, that we would not, because of the admission of such evidence, reverse the judgment.

Aside from our statute, this course, subject to the control of the court to prevent abuse of the right, has the sanction of high authority: *Starks v. People*, 5 Denio, 106; but the record requires the court to lay down no general rule on the subject.

4. The charge of the court as to the degree and quantity of proof was quite full and unexceptionable. While the defendant's instruction to the effect that if the theory of guilt

and innocence was equally satisfied by the whole evidence the jury should acquit, might properly have been given, yet it is not, in reality, as favorable for the defendant as the instructions actually given, and hence its refusal presents no error for which to reverse the judgment.

5. The defendant complains of the refusal of the court to instruct that an accomplice cannot be corroborated by his wife. In this there was no error. To have given it would have been, in substance, saying to the jury to disregard the testimony of Mrs. Bowman, instead of leaving them to judge of its credibility.

The doctrine asked to be given to the jury is not in unison with the provisions of our statute relating to evidence, nor the decisions of this court thereunder: Revision, secs. 3978, 3979 et seq.; *State v. Guyer*, 6 Iowa, 263; *State v. Rankin*, 8 Id. 355; *State v. Collins*, 20 Id. 85.

It is further to be observed that if Mrs. Bowman be regarded as the wife of an accomplice, her evidence is not the only corroborating evidence in the case. Indeed, the case of the state did not essentially depend upon the testimony of Bowman.

The question as to the liability of the county to compensate the defendant's witnesses is not properly before us on this appeal; and has, moreover, been previously decided by this court.

Affirmed.

HOMICIDE CAUSED BY DEATH OF MOTHER RESULTING FROM THIRD PERSON'S ATTEMPT TO PRODUCE ABORTION. — In the note to *Abrams v. Foshee*, 66 Am. Dec. 82-91, the crime of procuring an abortion is discussed at length. The present discussion will be confined to cases in which the death of the mother results from the attempt to procure an abortion upon her.

AT COMMON LAW, TO CAUSE DEATH OF MOTHER in procuring or attempting to procure an abortion upon her was held to be murder: 1 Hale P. C. 429; *Tinkler's Case*, 1 East P. C. 264; 4 Bla. Com. 201; 2 Bishop on Criminal Law, sec. 691; Wharton on Homicide, sec. 41; *Montgomery v. State*, 80 Ind. 338, 342, citing the principal case; *Commonwealth v. Parker*, 9 Met. 263; S. C., 43 Am. Dec. 396; *People v. Sessions*, 58 Mich. 594, 596, citing the principal case; *State v. Dickinson*, 41 Wis. 299. Lord Hale says: "If a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder; for it was not to cure her of a disease, but unlawfully to destroy the child within her; and therefore, he that gives a potion to this end must take the hazard, and if it kill the mother, it is murder": 1 Hale P. C. 429. And Bishop says on this subject: "If one administer a drug to a pregnant woman, or does to her any criminal act, the object of which is

merely to produce an abortion, yet, if in consequence of this act, dangerous in its tendency, the mother dies, . . . he is guilty of murder": 2 Bishop's Crim. Law, sec. 691. Shaw, C. J., who delivered the opinion of the court in *Commonwealth v. Parker*, 9 Met. 263, 8 C., 43 Am. Dec. 396, said: "So where, upon a similar attempt by drugs or instruments, the death of the mother ensues, the party making such an attempt, with or without the consent of the woman, is guilty of the murder of the mother, on the ground that it is an act done without lawful purpose, dangerous to life, and that the consent of the woman cannot take away the imputation of malice any more than in the case of a duel, where in like manner there is the consent of the parties." By the Illinois statute, to cause death by producing abortion is murder: *Beasley v. People*, 89 Ill. 571. In Pennsylvania, formerly the procuring of an abortion was murder in the first degree, if the intent was to take the life of the mother as well as that of the child; but murder of the second degree, if only the life of the child was intended to be taken: *Commonwealth v. Keeper of the Prison*, 2 Ashm. 227.

But section 87 of the criminal code of that state, enacted March 31, 1860, took this crime out of the class designated as murder, and made it a felony of lesser grade, and prescribed a punishment therefor of not exceeding five hundred dollars, and imprisonment for not exceeding seven years. Since the enactment of that section, a person charged with that offense must be indicted under it, and an indictment for murder charging that offense is not good, and will be quashed: *Commonwealth v. Railing*, 34 Pittsb. L. J. 65. In nearly all the states of the Union, the offense of producing an abortion upon a pregnant woman, where the death of the victim results, has been by statute reduced to murder of the second degree, or to manslaughter. In Maine, the employment of any instrument, with intent to destroy the child of which a woman is pregnant, and the destruction of such child, constitutes a felony; and if the death of the mother be occasioned by the use of such instrument with such intent, the offense is murder. But the using of means with intent to procure the miscarriage of a pregnant woman, and the procuring of the miscarriage thereby, unless done to preserve the life of the mother, is only a misdemeanor; and if by the use of such means, with such intent, the death of the mother be occasioned, it is manslaughter only. And if on such a charge in the indictment a verdict of murder be rendered, it will be reversed for error: *Smith v. State*, 33 Me. 48; 8 C., 54 Am. Dec. 607. When drugs have been administered, and instruments have been thrust into the body of the deceased, with the specific intent to produce abortion, these acts imply malice sufficient to sustain a prosecution for murder in the second degree: *State v. Thurman*, 66 Iowa, 693. In *Commonwealth v. Taylor*, 132 Mass. 261, it was held that the crime of producing an abortion, resulting in the death of the victim, may be committed, although it turns out that the woman was not pregnant at the time. Where the crime charged is manslaughter, committed by attempting to procure an abortion, it is immaterial whether or not the deceased, prior to the commission of the crime, made an attempt upon herself or not, unless such attempt contributed to her death: *State v. Glass*, 5 Or. 73.

MALICE AFORETHOUGHT, DEFINITION, ETC.: *Maher v. People*, 81 Am. Dec. 781, and note 891; *Keenan v. Commonwealth*, 84 Id. 414; express malice defined: *McCoy v. State*, 78 Id. 520.

ABORTION, OFFENSE OF, INDICTMENT FOR, ETC.: *Abrams v. Foster*, 66 Am. Dec. 77, and extended note 82.

ACCOMPLICE, COMPETENCY OF AS WITNESS: *Commonwealth v. Price*, 71 Am. Dec. 668, and note 671; testimony of, is suspicious in character: *State v. Stebbins*, 79 Id. 223.

ACCOMPLICE IN CASE OF ABORTION IN COMPETENT AS WITNESS: *Dunn v. People*, 86 Am. Dec. 319.

CORPUS DELICTI. — In a prosecution for procuring an abortion resulting in the death of a pregnant woman, it is the procurement of the miscarriage that constitutes the *corpus delicti*. And to sustain a conviction, this ought to be proved beyond a reasonable doubt: *Traylor v. State*, 101 Ind. 65.

SUFFICIENCY OF INDICTMENT. — An indictment which charges the defendant with forcing and thrusting a certain instrument, the name of which is unknown to the jury, up into the womb and body of a pregnant woman with intent to cause a miscarriage, and that by means of the forcing and thrusting said instrument into the body and womb of the woman, she died, sufficiently describes the instrument, and the cause and manner of the death, and is good: *Commonwealth v. Jackson*, 15 Gray, 187. But an information against a defendant for manslaughter in killing the deceased, whom it is averred that he feloniously, willfully, and wickedly did kill and slay, contrary to the statute, etc., without in any way setting out the means or manner of causing the death, or referring specifically to the statute, is insufficient, where the information is filed under a statute making it manslaughter for any person to administer to a woman pregnant with quick child any medicine, drug, or substance whatever, or use or employ any instrument or other means with intent to destroy such child, in case the death of the mother be produced thereby: *People v. Olmstead*, 30 Mich. 431. An indictment for involuntary manslaughter must show that the defendant was in the commission of some unlawful act, and that the death resulted from such act. An allegation that the death resulted from using unlawfully, willfully, and feloniously an instrument upon a pregnant female, for the purpose of procuring a miscarriage, the use of the instrument not being necessary to preserve the life of the woman, is insufficient: *Willey v. State*, 46 Ind. 363.

An indictment which charges one defendant with using instruments, and the same defendant, with other defendants, with administering drugs, to procure a miscarriage, and that by both of said means the woman died, is not bad for duplicity; and proof of the use of either one of the means alleged is sufficient to warrant a conviction: *Commonwealth v. Brown*, 14 Gray, 419. The indictment need not name the particular poison administered by the accused: *Carter v. State*, 2 Ind. 617. Since the enactment of the Massachusetts statute of 1853, chapter 37, an indictment in that state for procuring a miscarriage, and thereby causing the death of the woman, need not charge the offense to have been committed feloniously. Nor need it set forth the offense as murder in technical form: *Commonwealth v. Jackson*, 15 Gray, 187. Where the statute under which the indictment is found contains an exception, it is necessary to negative the exception in the indictment: *State v. McIntyre*, 19 Minn. 93. But where the act makes it a criminal offense to cause an abortion unless it is caused by a regular practitioner of medicine, an averment in the indictment that the persons charged with the offense were not regular practitioners of medicine sufficiently negatives the exception in the statute: *Hays v. State*, 40 Md. 633. An indictment for murder, charging in one count that the defendant, by means of a certain instrument, produced an abortion on the deceased, it not being then and there necessary to cause such miscarriage for the preservation of her life, and in another count that the defend-

ant administered to the deceased a noxious and abortifacient drug, it not being then and there necessary to administer such noxious and abortifacient drug to preserve her life, sufficiently negatives the exception in the statute in the words, "unless the same were done as necessary for the preservation of the mother": *Beasley v. People*, 89 Ill. 571. Where a defendant is charged with causing the death of a woman by producing an abortion upon her, in an indictment charging him in three counts, the first for murder, and the second and third for manslaughter, the distinct offense charged in such counts having been committed by the same acts, at the same time, and the same testimony being necessarily relied upon for conviction, the state will not be compelled to elect upon which count it will proceed: *People v. McDowell*, 9 Crim. Law Mag. 72; S. C., 30 N. W. Rep. 68 (Sup. Ct. Mich., Oct. 1886).

EVIDENCE. — Upon the trial of one indicted under the New York act of 1872, chapter 18, for causing the death of a woman by using an instrument upon her, with intent to produce a miscarriage, it was held not necessary for the prosecution to show that the use of the instrument was not necessary to preserve the life of the woman, or of the child, but that the burden of proving such necessity for its use rested upon the accused: *Bradford v. People*, 20 Hun. 309. But in *Moody v. State*, 17 Ohio St. 110, it was held that under the Ohio statute, in order to convict the defendant it is incumbent upon the state to prove that it was not necessary to perform the act charged in order to preserve the life of the woman. And in *State v. Clements*, 14 Pac. Rep. 410, it was held that under an indictment for manslaughter by producing an abortion not necessary to preserve the life of the mother, the burden of proof rests upon the state to show that the abortion was not necessary to preserve her life. On the trial of an indictment for procuring an abortion, it is competent for the prosecution to prove that the mother-in-law of the deceased told the defendant that her daughter-in-law was going away to get rid of her child, and that the defendant said, "Send her to me," adding that she had operated successfully five times upon one person: *Commonwealth v. Holmes*, 103 Mass. 440. Upon the trial of an indictment for procuring an abortion causing death, after proving interviews between the defendant and the deceased, and that he gave her drugs, the prosecution may give in evidence a circular issued and circulated by the defendant about two years before, advertising that he could be consulted in relation to the procuring of miscarriage, and advising females who should consult him how the same could be kept secret, and they be protected from criminal punishment: *Weed v. People*, 56 N. Y. 628. A speculum chair and other instruments adapted to use in producing abortions found in the possession of the accused are admissible in evidence: *Commonwealth v. Brown*, 121 Mass. 69; *Commonwealth v. Blair*, 126 Id. 40. If a party takes a girl to a house of ill-fame, and their causes an abortion to be produced upon her, the character of the house may be given in evidence on his trial for the offense, in order that the jury may determine whether the place is one where such a crime would be consummated without much danger of detection and punishment: *Hays v. State*, 40 Md. 650. On a trial for committing an abortion causing death, evidence extending over a period of four years, to the effect that the accused had stated that she had committed abortions, and could do it again, and that she had the instruments, is admissible on the question of knowledge and intent: *People v. Sessions*, 58 Mich. 594.

Where, after the death of the victim of an abortionist, cuts, wounds, and bruises are found in her womb, caused by some instrument used therein with violence, evidence that five months before the time of the alleged offense the defendant had in his possession an instrument which he described as be-

ing well fitted to produce abortion is admissible, it being shown that he had had opportunity to commit the crime: *Commonwealth v. Blair*, 126 Mass. 40. On the trial of an indictment for using instruments to procure a miscarriage, the injured parts of the body of the deceased preserved in spirits may be exhibited to the jury, in connection with the testimony of the physician who made the *post-mortem* examination: *Commonwealth v. Brown*, 14 Gray, 419. Where the evidence showed that ergot had been administered to the deceased, the state may be permitted to show that it was the popular opinion that ergot would produce abortion: *Carter v. State*, 2 Ind. 617. Evidence is admissible to show that the accused was in the habit of visiting the deceased, and that he had telegraphed to her father that she was very ill and wanted her mother to come to her: *People v. McDowell*, 9 Crim. L. Mag. 72; S. C., 30 N. W. Rep. 68 (Sup. Ct. Mich., Oct. 1886). A woman may conspire with others to procure a miscarriage of her own person, and the conspiracy being shown, her acts and declarations in furtherance of the common design are evidence against others engaged with her in the criminal act: *Solander v. People*, 2 Col. 48. In a prosecution for causing the death of a pregnant woman by administering drugs or using an instrument upon her for the purpose of destroying the child, evidence of statements made by her before going to the house of the deceased, or immediately upon her return, as to her purpose and object in going there, is admissible as parts of the *res gestæ*, to show the intent with which the visit was made: *State v. Dickinson*, 41 Wis. 299; *State v. Howard*, 32 Vt. 380; *Solander v. People*, *supra*.

DYING DECLARATIONS, ADMISSIBILITY OF. — As a general rule, dying declarations are only admissible when the death of the person who made them is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. The following cases decide that this rule renders inadmissible the dying declarations of a woman upon whom an abortion causing death has been committed, holding that, in a prosecution for the perpetration of the crime, the death of the deceased is not the subject of the charge: *Regina v. Hind*, 8 Cox C. C. 300; *Rez v. Hutchinson*, 2 Barn. & C. 608, note; *People v. Davis*, 56 N. Y. 95; *State v. Harper*, 35 Ohio St. 78; *Railing v. Commonwealth*, 7 Crim. L. Mag. 105 (Sup. Ct. Pa., Oct. 1885). In the case last cited, Green, J., delivering the opinion of the court, after reviewing the cases on both sides of the question, said: "We feel constrained to say that we think the better and safer rule is to limit the admissibility of dying declarations to cases of homicide only." The case of *People v. Davis*, *supra*, was decided in 1874, and in 1875 the legislature of New York amended the statute of that state by adding the following provision: "In all prosecutions under and in pursuance of this act, the dying declarations of the woman whose death is produced by any of the means hereinbefore set forth shall be admitted in evidence, subject to the same restrictions as in cases of homicide": Laws of N. Y. 1875, c. 352. But it is held in the following cases that the dying declarations of the deceased are admissible, because the death gives to the offense the character of a felonious homicide: *Montgomery v. State*, 80 Ind. 338; *Commonwealth v. Bruce*, 5 Crim. L. Mag. 680 (Phila. Quart. Sess. 1884), subsequently overruled by *Railing v. Commonwealth*, 7 Crim. L. Mag. 105 (Sup. Ct. Pa., Oct. 1885); *State v. Dickinson*, 41 Wis. 299. And see *Maine v. People*, 9 Hun, 113, decided under the amendment to the New York act quoted above. The declarations, however, must be of facts only, and not of mere matters of opinion, and must be such as would have been competent evidence, if the dying person had been sworn as a witness. The statement that "the opera-

tion was performed for the purpose of producing an abortion," is an inference, and not admissible as a dying declaration: *Montgomery v. State*, 80 Ind. 338. And what the deceased said after she left the private room in which she was operated upon, and when she was not in apprehension of death, is not admissible in evidence. It is not a part of the *res gesta*, but merely a part of a past transaction: *Hays v. State*, 40 Md. 650; *Davis v. People*, 2 Thomp. & C. 212; *Mains v. People*, 9 Hun, 113; *State v. Clements*, 14 Pa. Rep. 410.

HUNTINGTON v. JEWETT.

[25 IOWA, 29.]

PLAINTIFF IN ACTION OF RIGHT MUST RECOVER UPON STRENGTH OF HIS OWN TITLE, and not upon the weakness of his adversary's. He must show the legal title to be in himself.

ADJUDICATION THAT CONVEYANCE OF REAL ESTATE IS FRAUDULENT, as against certain creditors of the grantor, affects the title of the grantees only so far as such creditors are concerned who were parties to the proceeding in which the adjudication was had. Other creditors, not parties, cannot avail themselves of the adjudication.

EJECTMENT. The opinion states the case.

Charles M. Dunbar and B. W. Poor, for the appellants.

William Graham, for the appellees.

By Court, DILLON, C. J. By the pleadings each party claims the legal title. No equitable issues are made. Both parties claim under one Joseph McCloy, by virtue of different execution sales and sheriff's deeds. The judgment under which the plaintiffs claim title, and one of the judgments under which the defendants claim title, were rendered on the same day. But plaintiffs' sale was the elder one, and this sale, assuming its regularity, and had Joseph McCloy been possessed of the legal title, would, under the doctrine recognized in *Cook v. Dillon*, 9 Iowa, 407 [74 Am. Dec. 354], give to the plaintiffs the title as against a subsequent sale under a judgment of equal date. The other judgment under which the defendants claim is junior to the plaintiffs'. But anterior to the rendition of any of these judgments against Joseph McCloy, he had conveyed the property in question to Samuel McCloy, and this conveyance was duly recorded. The legal title was in Samuel at the time the sheriff's sale was made to the plaintiffs.

Before the defendants' sales were made, decrees had been obtained declaring the deed from Joseph to Samuel McCloy fraudulent and void as to the judgments under which defend-

ants claim title, and afterward sales under their judgments were made, and in due time defendants procured deeds from the sheriff. On the trial the plaintiffs offered in evidence their deed from the sheriff, and also the record of other deeds and the book of original entries, showing title in the judgment defendant, Joseph McCloy. This made a *prima facie* case for the plaintiffs.

Defendants introduced in evidence the record of the deed from Joseph McCloy to Samuel McCloy, made and recorded prior to rendition of the judgment, which was the basis of the plaintiff's sale; also the judgments, decrees, sheriffs' deeds, etc., under which they claim title.

It is not necessary to determine whether the plaintiffs' objections to the validity of the sheriff's sales, under which defendants claim, are well grounded or not.

The plaintiffs must recover on the strength of their own title. Under the pleadings they must show the legal title to be in themselves.

This they apparently did. But when the defendants introduced the deed from Joseph McCloy to Samuel, antedating the rendition of the plaintiffs' judgment, this showed the legal title to be as against the plaintiffs in the said Samuel.

The plaintiffs did not show that they had taken any steps to have this deed declared fraudulent.

They did not offer to show (even were this conceded to be competent in this form of action) that the deed to Samuel was fraudulent, in fact, as to them.

The argument made by the plaintiffs' counsel in reply to this objection to their recovery is, "that it was not necessary, for the reason that the defendants themselves produced two solemn adjudications of the court declaring it to be void." This argument has no force. The plaintiffs were not parties to the suit in which the decrees were rendered. Those decrees only decided the deed to be fraudulent as to the two creditors of Joseph McCloy, who filed bills for that purpose, and under whose judgments defendants derive title. It may have been fraudulent as to those two creditors, and not as to the plaintiffs, who, for aught that appears in the present case, may have been subsequent creditors, without any right to complain of the deed from Joseph to Samuel McCloy: *Hook v. Mowre*, 17 Iowa, 195, 202.

Certain it is, that, as between plaintiffs and Samuel McCloy, the legal title is in the latter. That such title is fraudulent as

to the plaintiffs has never been established, and this should properly be established in a suit to which the said Samuel and the plaintiffs are parties.

Affirmed.

PLAINTIFF IN EJECTMENT MUST RECOVER ON STRENGTH OF HIS OWN TITLE, either as being good against all the world, or good against the defendant by estoppel: *Clarke v. Diggs*, 44 Am. Dec. 33; *Wolfe v. Dowell*, 51 Id. 147; he is entitled to recover if he shows a paramount title to any part of the premises described in his complaint: *Bess v. Hines*, 89 Id. 594.

CONVEYANCE FOR PURPOSE OF DEFRAUDING GRANTOR'S CREDITORS IS VALID between the parties, and as to all the world, except the creditors of the grantor: *Lawton v. Gordon*, 91 Am. Dec. 670, and cases collected in note 672.

FRAUDULENT CONVEYANCE, WHAT CREDITORS MAY ATTACK: *Cook v. Johnson*, 72 Am. Dec. 381, and note 384; *Vasser v. Henderson*, 90 Id. 351.

THE PRINCIPAL CASE IS CITED in support of the rule that a judgment is conclusive as an estoppel only upon the parties or their privies, and the record of a former adjudication cannot be introduced to affect the rights of a stranger to the proceedings, in *Stoddard v. Burton*, 41 Iowa, 585.

MOORE v. LOWREY.

[25 Iowa, 336.]

NO PARTICULAR FORM IS NECESSARY TO CONSTITUTE ASSIGNMENT OF DEBT.

It may be verbal or in writing; and if in writing, and the intent and contract of the parties is not fully expressed therein, it may be shown by evidence *aliunde*.

ASSIGNMENT OF DEBT IN FORM OF ORDER TO PAY IT TO ASSIGNEE IS GOOD, and is not defeated by the fact that the order is negotiable in form, if it was given in good faith, and the assignment was in fact made.

ASSIGNMENT OF CLAIM IS GOOD, though not taken by the assignee in payment of, but only as collateral security for, a pre-existing debt.

GARNISHEE IS NOT CHARGEABLE WITH INTEREST UPON FUNDS IN HIS HANDS unless it be shown that he used the money for which he is liable. And this rule is not changed by a statutory provision that the garnishee may exonerate himself from liability by paying the money into the hands of the sheriff.

SEPARATE actions in attachment were brought by the plaintiffs against Miles and Keeler, and Lowrey was served with garnishee process. Judgment was had against Miles and Keeler; and before the garnishee answered, Fowler and Munson intervened, claiming an assignment to them from Miles and Keeler before the service of the garnishee process upon Lowrey, whatever debt they held against Lowrey. Judgment was rendered in favor of the intervenors against the

garnishee for the amount of the debt admitted in his answer, without interest. The plaintiffs excepted to such rendering of judgment, and the intervenors excepted to the decision of the court in disallowing interest. All these parties appealed. Other facts appear in the opinion.

Wilson and Doud, for the plaintiffs and the garnishee.

Griffith and Knight, for the intervenors.

By Court, BECK, J. Miles and Keeler, being in failing circumstances, were indebted to the intervenors, Fowler and Munson. In settlement of this claim against them, they transferred to Fowler and Munson the claim they held against Lowrey, the garnishee, on the eighteenth day of January, 1866, by an instrument of which the following is a copy:—

“H. Lowrey, Esq., Dubuque, Iowa,

To Miles and Keeler, Dr.

“1866, Jan. 18. To balance of account to date \$788 40

“H. LOWREY, Esq.:—

“Please pay the above balance to Messrs. Fowler and Munson, or order, and oblige,

MILES AND KEELER.”

To this instrument was affixed a two-cent United States internal revenue stamp. The evidence discloses the fact that it was the intention of Miles and Keeler to transfer and assign the claim they held upon Lowrey to Fowler and Munson, and the instrument above set out was by the parties intended to effect that purpose. Lowrey was, within a day or two, notified by Miles and Keeler, by letter, that they had drawn on him in favor of Fowler and Munson for the balance due them, but no information was conveyed in the letter of the nature of the transaction further than the fact that they had drawn an ordinary draft or order. The garnishee process was served upon Lowrey on the twentieth day of January, two days after assignment of the claim to the intervenors, but the draft, or “order,” was presented prior to his answer to the process.

The plaintiffs insist that the transaction between Miles and Keeler and Fowler and Munson did not operate to assign and transfer the debt against the garnishee, and that judgment should therefore have been rendered against him in their favor.

No particular form is necessary to constitute an assignment of a debt. If the intent of the parties to affect an assignment be clearly established, that is sufficient. Neither is it necessary that the assignment be in writing. If in writing, it may

be in the form of an agreement, an order, or of any other instrument which the parties may use for that purpose. Neither is it necessary that the intent and the contract of the parties fully appear in the writing, but they may be otherwise shown. See *Conyngham v. Smith*, 16 Iowa, 474; *Wiggins v. McDonald*, 18 Cal. 127; *Macomber v. Doan*, 2 Allen, 542; *Edwards v. Daly*, 14 La. Ann. 384; *Newly v. Hill*, 2 Met. (Ky.) 531.

The district court was clearly justified in finding from the evidence that it was the intention of Miles and Keeler to assign the debt held by them against the garnishee, and that they did, in fact, assign and transfer it to the intervenors.

These views dispose of all the objections raised by plaintiffs. One or two, however, may properly receive special notice. It is insisted that the order, if intended to operate as an assignment, is void, because not properly stamped. But it is not claimed that the order is itself an assignment, or without more, is evidence of an assignment. It is, therefore, properly stamped.

It is objected that the order is negotiable, and was not taken by the intervenors in payment *pro tanto* of their claims upon Miles and Keeler. These facts may be admitted, yet it does not follow that the assignment is thereby defeated. If the assignment of the debt was made in good faith, and the order given for the purpose of effectuating its collection, the negotiability of the order certainly could not defeat the assignment.

Neither is it sufficient cause to defeat the assignment, if it be true that Miles and Keeler were not discharged *pro tanto* of their indebtedness to the intervenors. The assignment would have been good if the debt against Lowrey was taken only as collateral security by Fowler and Munson.

Certain exceptions were taken to portions of depositions taken by the intervenors on the grounds of incompetency and irrelevancy of the evidence contained therein. The objections were overruled by the court below, and the depositions were read in evidence. We do not think the objections, in point of fact, were well taken, and were therefore correctly overruled by the court.

The intervenors, Fowler and Munson, upon their appeal, insist that the district court erred in refusing to render judgment for interest upon the debt from the date of the order to the day of trial. The authorities seem to agree that unless the garnishee used the money for which he is liable, he is not

chargeable with interest. The courts presume, unless the contrary appear, that it was not used by him, but kept as a separate fund to answer the judgment of the court. If he appears as a litigant in the proceedings, it will overcome this presumption. And we presume it would be proper, upon issue joined, to show that, in fact, the money was not kept as a separate fund, but actually used by him, and thus charge him with interest upon the debt: See *Drake on Attachment*, sec. 665, and authorities cited.

But the garnishee in this case did not deny the indebtedness, and in no way appears as a litigant. Neither is the presumption that he kept the money as a separate fund attempted to be overcome.

Section 3207 of the Revision, which provides that a garnishee may, in order to exonerate himself from liability, pay the money to the sheriff, is cited to support the view that interest should be assessed against the garnishee. It is said that, under this section, he is not compelled to keep the money, and therefore ought to pay interest upon it. But neither is he compelled under this section to pay it over to the officer of the court. It seems to be left to his option whether he will retain it or pay it into court. This provision cannot, therefore, change the rule of the authorities above cited.

It will be observed that the debt of the garnishee was upon an account, and not upon an interest-bearing contract.

We find no errors in the record, and the judgment of the district court, upon the appeal, both of the intervenors and plaintiffs, is affirmed.

PAROL ASSIGNMENT OF CHOSE IN ACTION IS VALID, both at law and in equity: *Hooker v. Eagle Bank*, 86 Am. Dec. 351, and note 355.

DIRECTION BY CREDITOR FOR APPROPRIATION OF DEBT AND ASSENT OF DEBTOR is all that is necessary to constitute a legal transfer of the debt: *Martin v. Maner*, 70 Am. Dec. 223.

GARNISHEE MUST BE CHARGED ONLY ON HIS CONTRACT, and cannot be compelled to pay the debt twice, or be exposed to expense: *Walters v. Insurance Co.*, 63 Am. Dec. 451.

THE PRINCIPAL CASE IS CITED to the first and second points stated in the syllabus, in the following cases: *McWilliams v. Webb*, 32 Iowa, 580; *Barthol v. Blakin*, 34 Id. 453; *Howe v. Jones*, 57 Id. 141; *County of Des Moines v. Hinkley*, 62 Id. 643, 645; *Foster v. Trenary*, 65 Id. 623; and is cited to the point that the holder of a negotiable note may maintain an action thereon, though it has not been indorsed to him, by showing that he was the owner under an assignment made otherwise than by indorsement, in *Warnock v. Richardson*, 50 Id. 451.

STEWART v. ROGERS

[25 IOWA, 325.]

WHETHER VOLUNTARY CONVEYANCE TO CHILD WILL BE FRAUDULENT and void as to creditors of the father, in the absence of actual intent to defraud, will depend upon its reasonableness, and the condition of the grantor as to his ability to pay his debts out of other property retained by him.

STATE OF FACTS HELD SUFFICIENT TO RENDER VOLUNTARY CONVEYANCE TO CHILD VOID as to existing creditors of the father.

CREDITOR'S bill, seeking to set aside as fraudulent certain conveyances of lands made by Rogers to his co-defendants, consisting of his four children and son-in-law. In April, 1860, he conveyed two hundred acres of land to each of his four children, the conveyances being voluntary, and admittedly a gift to them. In March, 1861, he conveyed ninety acres to each of two of his said children, and two sons-in-law, the defendants claiming that the lands were sold, and not given, to them. At the time of the first conveyances, Rogers was indebted as follows: To Ewing about thirteen hundred dollars; to James, about twelve hundred dollars; to Allen, about five thousand five hundred dollars; and to the plaintiff, Stewart, about eleven hundred dollars. Mortgages on real estate, other than that conveyed to the children, secured all these debts, except the one due James, which was secured by chattel mortgage; and the debts have all been paid, except the plaintiff's, and a balance due Ewing. The debts to Ewing and the plaintiff thus arose: Prior to April, 1860, Rogers was indebted to one West, and this debt subsisted in January, 1860. West bought goods to the amount of five thousand dollars from one Vanter, who was owing confidential debts to Ewing and the plaintiff. In order to secure the debt from Rogers to West, the former, at the latter's request, executed in January, 1860, one note to the plaintiff for about one thousand dollars, and one to Ewing for about twelve hundred dollars, and to secure these notes, he executed at the same time two mortgages, one to the plaintiff, and the other to Ewing, on 480 acres owned by him, and other than that subsequently conveyed by him to his children. On the 2d of April, 1861, the plaintiff obtained judgment on his note, and an order for a general execution, and Ewing obtained a like judgment on his note on the same day; and neither of them sought in these actions to foreclose their mortgages, which stood as equal security for their respective notes. In May,

1861, the plaintiff issued execution on his judgment against Rogers, and levied upon the 480 acres of land embraced in his mortgage, and the sheriff returned that it was not sold for want of bidders. In October, 1861, he issued another execution on his judgment, and the same was levied upon certain personal property; but the sheriff returned that, finding the title doubtful, and indemnity being refused, he released the property from levy, and could find no other property on which to levy. He issued another execution in June, 1865, on which was returned "no property." Ewing issued an execution on his judgment, levied upon the 480 acres of land embraced in his mortgage as well as in that of the plaintiff, bought the same in for \$960, and finally obtained a sheriff's deed. The bill was dismissed, and the plaintiff appealed.

Leonard and Mott, for the appellant.

S. G. Ruby, for the appellees.

By Court, DILLON, C. J. It is proposed briefly to state our views of the case without entering at large into an examination of the testimony. The case naturally divides itself into two parts, viz., the conveyances of the 800 acres of land in April, 1860, and the conveyances of the 360 acres in March, 1861.

The conveyances of April, 1860, of the eight hundred acres by John A. Rogers to his four children, were confessedly voluntary. This Mr. Rogers and the children all admit; though it is in testimony that these conveyances were made by the father (whose daughters were married and his sons nearly of age) in pursuance of a previous purpose on his part to make such a division of his estate among his children.

In the absence of an existing actual intent to defraud, whether a voluntary conveyance to a child will be void as to the creditors of the father will depend upon its reasonableness, and the condition of the grantor as respects his ability to pay his debts out of the property retained by him. The authorities are not uniform, but such has been the view of this subject heretofore taken in this court: See *Carson v. Foley*, 1 Iowa, 524; *Lyman v. Cessford*, 15 Id. 229; *Hook v. Mowre*, 17 Id. 195; *Culbertson v. Lucky*, 13 Id. 12; *Sexton v. Wheaton*, 1 Am. Lead. Cas. 68, 72, and cases cited.

Recognizing the rule above stated, as it is illustrated in its application in the authorities cited and referred to, it is our opinion—in view of the large amount of property conveyed to the children, the large indebtedness of the donor at the time,

the comparatively small amount of real property not embraced in this disposition, the short period of time which elapsed after the conveyance in question, and the confessed insolvency of the voluntary grantor—that the conveyances made in April, 1860, cannot be sustained as against the plaintiff.

If made without any meditated fraud, and in pursuance of a previous purpose on his part to make such a division of his estate among his children, still these conveyances would operate, if sustained, to effect a fraud upon his creditors existing at the time.

Respecting the conveyances of the 360 acres in March, 1861, it is our opinion that these cannot be sustained as against the plaintiff, Stewart.

At this time, suits were pending, or about to be brought, against Rogers. He was fearful that the mortgaged property might possibly not pay his debts.

He does not claim that he conveyed this last 360 acres to his children to make a provision for them, for he had done that before; but he claims that he made a sale of this land to them, and that they paid him for it. We have examined the whole evidence very carefully, and are satisfied that these were not *bona fide* sales and conveyances. The price alleged to have been paid was very inadequate, and the evidence of payment by no means satisfactory.

The decree dismissing the plaintiff's petition is reversed and the cause remanded, with directions to the court to charge and apportion the amount due Stewart upon the lands conveyed by Rogers in April, 1860, and on the 4th of March, 1861; and if not paid by such time as the court shall fix, to order them to be subjected to the plaintiff's judgment. The district court will except from the lands so to be charged any which were *bona fide* conveyed by any of the defendants prior to the institution of this suit.

Reversed.

CONVEYANCE TO HIS CHILDREN BY ONE WHO IS INDEBTED IN LARGE AMOUNT in proportion to the value of his estate is constructively fraudulent as well to subsequent as to pre-existing creditors: *Lowry v. Fisher*, 92 Am. Dec. 475.

VOLUNTARY CONVEYANCE, IN VIEW OF GRANTOR'S FUTURE INDEBTEDNESS, and with an intent to place his property beyond the reach of his creditors, is fraudulent as against the creditors, and will be set aside: *Cramer v. Bedford*, 90 Am. Dec. 594, and see cases collected in note 601.

CONVEYANCE BY FATHER LARGELY INDEBTED TO SON, on consideration of his paying part of debts, is void: *Jessup v. Johnston*, 67 Am. Dec. 243.

DANIELS v. BOWE.

[25 IOWA, 402.]

FIXTURES — BREACH OF BOND TO RETURN. — The fixtures in a mill erected upon land on which were two mortgages were sold under execution by the junior mortgagee, and by him purchased and removed from the mill. He then rented the fixtures to a third party, who, with his consent, placed them back in the mill for use, giving his bond for their return. *Held*, that they thereby became subject to the senior mortgage, and by a foreclosure thereof and a sale thereunder of the real estate, the fixtures passed to the purchaser, and the right of the purchaser under the junior mortgage thereby becoming extinct, the party hiring the fixtures from him is excused from returning them, and cannot be held liable in an action on his bond therefor. Beck, J., dissenting.

ACTION on a bond given for the return of certain fixtures hired of the plaintiffs. The cause was tried before a referee, who found that the plaintiffs were entitled to recover the value of the fixtures. The defendant appealed. The material facts appear in the head-note and opinion.

C. H. Conklin, for the appellant.

N. M. Hubbard, for the appellee.

By Court, COLE, J. We do not stop to discuss the question as to what rights the plaintiffs acquired by their purchase of the fixtures under the execution at law. After they had obtained the possession of them, they leased or hired the same to this defendant for the purpose of having the same again placed in the mill and used as before their removal. When so replaced they became subject to the school-fund mortgage, which was prior to the mortgage or claim of these plaintiffs, certainly so in the absence of actual notice to the mortgagee of either the sale or severance. This prior mortgage was then foreclosed, these plaintiffs being parties defendants to the foreclosure proceedings; under the foreclosure decree the real property was sold to the state for an amount considerably less than the mortgage debt. These fixtures, being then in the mill, passed to the purchaser of the real estate, and thereby the right or title of the plaintiffs therein became extinguished or terminated.

The defendant is excused from returning the property, although he had covenanted to do so, by reason of the fact that the right of the plaintiffs to its return had, by virtue of the legal proceedings against them, expired and ended. This would be true, even if the contract of lease or hiring had

pertained to real estate; for it is a well-settled rule that, although a tenant cannot dispute his landlord's title, he may nevertheless show that his title has expired: *Jackson v. Rowland*, 6 Wend. 670; *Despard v. Walbridge*, 15 N. Y. 374; *Simons v. Marshall*, 3 G. Greene, 504. Since, therefore, the plaintiffs have no right to the property, it is clear they have no right to recover its value. The purchase of the real estate by the defendant from the state of Iowa, after the state had bought it at the foreclosure sale, perfected the title to the property in the defendant, and he may protect himself thereunder. By his purchase he acquired all the right the state had as against the plaintiffs.

The fact that by the terms of the agreement or understanding, as found by the referee between plaintiffs and defendants, the property in controversy was to be again placed and used in the mill, does not by any means tend to enlarge the obligation of defendant to return the same, though lost to plaintiffs by reason of being so replaced in the mill. But on the contrary, that understanding shows that the hazard of being so lost was agreed to by plaintiff, and against which they took no express covenant from the defendant.

There was also involved in this same contract of hiring certain personal property, for which plaintiff recovered, and as to which the defendant makes no question; as to that portion of the property the judgment is affirmed. As to the fixtures, as found by the referee, the judgment of the district court is reversed.

BECK, J., dissented.

FIXTURES, MORTGAGE OF AS PERSONALTY PASSES NO TITLE AS AGAINST SUBSEQUENT PURCHASER: *Richardson v. Copeland*, 66 Am. Dec. 424, and see note 426.

FIXTURES, RIGHT TO SEVER: *Witmer's Appeal*, 82 Am. Dec. 505; *Johnson v. Wiseman*, 83 Id. 475.

TRADE FIXTURES, RIGHT OF TENANT TO REMOVE: *Kelly v. Austin*, 92 Am. Dec. 243; *Lacey v. Giboney*, 88 Id. 145, and note 148; *Wall v. Hinds*, 64 Id. 64.

HOUSE SITUATED UPON LAND AT TIME LATTER IS MORTGAGED FORMS PART OF REALTY, and as such is affected by the mortgage lien: *Buckout v. Swift*, 87 Am. Dec. 90; see *Kelly v. Austin*, 92 Id. 243.

FIXTURES, REMEDIES FOR WRONGFUL REMOVAL OF: *Hamlin v. Parsons*, 90 Am. Dec. 284, and cases collected in note 287; *Smith v. Price*, 89 Id. 284.

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ABANDONMENT.

1. ONE WHO FIRST TAKES POSSESSION OF LAND MAKES IT HIS BY OCCUPANCY as against all the world, except the true owner; and the land remains his as against all persons entering afterwards without his consent, and without title, unless he abandons it, or it is taken from him by some method known to the law. *Moon v. Rollins*, 181.
2. ABANDONMENT IS QUESTION OF INTENTION, to be determined from the evidence. *Id.*
3. ABANDONMENT OF LAND DOES NOT OCCUR if the person in possession leaves it with the intention of returning. An abandonment takes place only when one in possession leaves with the intention of not again resuming possession. *Id.*
4. MERE LAPSE OF TIME DOES NOT CONSTITUTE ABANDONMENT; but it is only a circumstance to be considered for the purpose of ascertaining the intention of the parties. *Id.*
5. AFTER TITLE BY PRIOR POSSESSION IS ONCE SHOWN, THERE IS NO PRESUMPTION OF ITS LOSS; but an abandonment must be made to appear affirmatively by the party relying on it to defeat a recovery. *Id.*

ABORTION.

See CRIMINAL LAW, 11, 12.

ACT OF GOD.

1. ACTS OF GOD, IN LEGAL SENSE, ARE THOSE ACTS which do not happen through human agency, as storms, lightning, and tempests. *Polack v. Picke*, 115.
2. ELEMENTS ARE MEANS THROUGH WHICH GOD ACTS, and "damages by the elements" are damages by the act of God. *Id.*

ADEMPTION.

See WILLS.

ADMIRALTY.

See JURISDICTION.

ADVANCEMENTS.

See WILLS.

ADVERSE POSSESSION.

1. ONE WHO HAS BEEN IN CONTINUED, EXCLUSIVE, ADVERSE POSSESSION OF LAND FOR FIVE YEARS IS ENTITLED TO BENEFIT OF STATUTE OF LIMITATIONS, although the five years are not "next preceding" the commencement of the action. *Cannon v. Stockmon*, 205.
2. ONE WHO HAS BEEN IN ADVERSE POSSESSION OF LAND FOR FIVE YEARS THEREBY ACQUIRES FEE-SIMPLE TITLE; and it seems, if he is then ousted, even by the party holding the paper title, he can recover possession at any time before his right of action is barred by a five years' adverse possession. *Id.*
3. FEE ONCE ACQUIRED BY FIVE YEARS' ADVERSE POSSESSION CONTINUES until conveyed by the possessor, or until lost by another adverse possession of five years. *Id.*
4. PARTY CLAIMING TITLE BY FIVE YEARS' ADVERSE POSSESSION MAY GIVE IN EVIDENCE HIS ACTS AND DECLARATIONS, made or done at any time while in possession, for the purpose of showing the character in which he claimed. *Id.*
5. POSSESSION OF GRANTOR IS NOT ADVERSE TO TITLE OF HIS GRANTEE. *Rowe v. Beckett*, 676.
6. PURCHASE OF OUTSTANDING ADVERSE CLAIM TO LAND BY ONE IN POSSESSION, CLAIMING ADVERSELY TO ALL OTHERS, for the purpose of quieting his title, does not estop him from setting up the statute of limitations against a third party also claiming under an adverse title. *Cannon v. Stockmon*, 205.

AFFIDAVITS.

AFFIDAVIT THAT "FOREGOING ASSESSMENT IS CORRECT TO BEST OF OUR JUDGMENT," is a sufficient compliance with the requirements of a statute requiring an affidavit that "the same is in all respects a true assessment to the best of their judgment and belief." *Large v. Keen's C. D. Co.*, 696.

AGENCY.

1. **AGENT DEALING WITH PRINCIPAL FOR PROPERTY** in regard to which he stands in a fiduciary relation by reason of having had its care, and having collected the rents, paid the taxes, and the like, is bound to make to the principal the fullest disclosure of all the matters connected with it, within his knowledge, which it is important for the principal to know, in order to treat understandingly. If, therefore, the agent, by concealment of such facts and information, obtains the property at a greatly inadequate price, the sale will be set aside. And a sale by the agent, of property so obtained, to one taking with full knowledge of the facts, will likewise be set aside. *Norris v. Tayloe*, 568.
2. **NOTICE BY PRINCIPAL TO THIRD PERSONS OF CONTENTS OF WRITTEN AGREEMENT WITH AGENT TERMINATING AGENCY** is sufficient notice of the termination of the agency. *Van Dusen v. Star Q. M. Co.*, 209.
3. **DECLARATIONS OF AGENT TO THIRD PERSONS THAT AGENCY HAD BEEN RENEWED** ARE NOT ADMISSIBLE AGAINST PRINCIPAL to establish a new agency, after such third persons have been notified by the principal that the agency had terminated. *Id.*
4. **THIRD PERSONS HAVE NO JUST RIGHT TO CONCLUDE THAT NEW AGENCY HAD BEEN ESTABLISHED**, after they have been notified by the principal that the former agency had ceased, from the fact that the agent was conducting business as formerly. *Id.*

5. **PRINCIPAL IS LIABLE TO THIRD PERSONS DEALING WITH AGENT AFTER AGENCY HAS CEASED**, until they are notified of the termination of the agency. *Id.*
6. **AGENT'S AUTHORITY TO DRAW CHECKS FOR HIS PRINCIPAL WILL BE PRESUMED**, in the absence of counter-evidence, where the proof shows that the agent was in the habit of signing his principal's name to checks, and which was permitted by his principal. *Cross v. People*, 474.
See CORPORATIONS, 13-17; INTERPLEADER; PLEDGE, 3; RAILROADS.

ALTERATION OF INSTRUMENTS.

SPOILIATION OF INSTRUMENT BY STRANGER WITHOUT KNOWLEDGE OR CONSENT OF PARTIES in interest cannot change the rights or liabilities of those parties. *Piersol v. Grimes*, 673.

APPLICATION OF PAYMENTS.

1. **DEBTOR MAY APPROPRIATE PAYMENT TO WHICH DEBT HE PLEASER**, if he makes the appropriation at the time he makes the payment, for he cannot do so afterwards; but if no specific appropriation be made by the debtor at the time of payment, then the right of appropriation is devolved upon the creditor, and he may make it in any way he may think proper, and at any time before an account is settled between them, or before action brought; provided that such appropriation is not manifestly inequitable in respect to third persons. *Pickering v. Day*, 291.
2. **IF NO APPROPRIATION BE MADE BY EITHER, DEBTOR OR CREDITOR**, the payment must be applied as the law directs. *Id.*
3. **WHERE THERE IS SINGLE RUNNING ACCOUNT IN WHICH THIRD PERSONS ARE NOT INTERESTED**, and neither debtor nor creditor makes the appropriation, the law will apply the payment to the discharge of the several items of the account in the order of their priority, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side of it. *Id.*
4. **WHERE THERE ARE INTERVENING EQUITIES IN FAVOR OF THIRD PERSONS**, the law will apply the payments according to its own notion of the intrinsic justice and equity of the case. *Id.*
5. **WHERE PUBLIC OFFICER HAS GIVEN DIFFERENT BONDS, AT DIFFERENT TIMES, WITH DIFFERENT SURETIES**, his payments must be so appropriated as to give each bond credit for the money respectively due, collected, and paid under it. *Id.*

ASSAULT AND BATTERY.

IN ACTION FOR DAMAGES FOR ASSAULT AND BATTERY, LANGUAGE OF DEFENDANT, used at the time of making the assault, is admissible in evidence for the purpose of characterizing the act, as bearing on the question of malice. *Macdougall v. Maguire*, 98.

See PLEADING AND PRACTICE, 9.

ASSIGNMENTS.

1. **NO PARTICULAR FORM IS NECESSARY TO CONSTITUTE ASSIGNMENT OF DEBT**. It may be verbal or in writing; and if in writing, and the intent and contract of the parties is not fully expressed therein, it may be shown by evidence *aliunde*. *Moore v. Lowrey*, 790.

2. **ASSIGNMENT OF DEBT IN FORM OF ORDER TO PAY IT TO ASSIGNEE IS GOOD**, and is not defeated by the fact that the order is negotiable in form, if it was given in good faith, and the assignment was in fact made. *Id.*
3. **ASSIGNMENT OF CLAIM IS GOOD**, though not taken by the assignee in payment of, but only as collateral security for, a pre-existing debt. *Id.*

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. **EXISTING CORPORATION MAY MAKE ASSIGNMENT** in trust for all its creditors. *McCallie v. Walton*, 369.
2. **ASSIGNMENT BY CORPORATION OF ALL ITS PROPERTY** in trust for the benefit of all its creditors, with direction that the assignees shall proceed with reasonable and convenient dispatch to convert the property into money, and for that purpose to sell and dispose of any and all of the property in such manner and on such terms as they may deem most for the interest of such trust, is valid, and not obnoxious to the statutes of 13 and 27 Elizabeth, as an attempt to delay creditors. *Id.*
3. **UNLESS INTENT AND PURPOSE TO HINDER AND DELAY CREDITORS** is clearly visible in an assignment for the benefit of creditors having the appearance of fairness, it should not be held obnoxious to the statutes of 13 and 27 Elizabeth. *Id.*
4. **JUDGMENT OBTAINED SUBSEQUENT TO ASSIGNMENT** for the benefit of creditors creates no lien so as to give it priority in the distribution of assets. *Id.*
5. **ASSIGNMENT FOR BENEFIT OF CREDITORS.** — Provisions of Georgia code relating to the "forfeiture of bank charters and liabilities to stockholders," and giving to bill-holders priorities over other creditors, also prescribing the order of payment of debts when the bank is insolvent, and prescribing the duties of a receiver appointed by the court after rendition of judgment forfeiting the charter, has no application to a voluntary assignment by a bank for the payment of all its debts. *Dobbins v. Walton*, 371.
6. **WHERE BANK MAKES ASSIGNMENT FOR BENEFIT OF CREDITORS**, and among its assets are certain shares of stock in another corporation, the latter corporation by assenting to the assignment does not lose its lien given by law for the payment of the value of such stock. *Id.*
7. **ASSIGNEE OF VOLUNTARY ASSIGNMENT FOR BENEFIT OF CREDITORS** stands in no better situation than the assignor. Neither he nor the creditors whom he represents are purchasers for valuable consideration, without notice, as against prior equitable liens. *Id.*
8. **IN PROCEEDINGS TO DISTRIBUTE FUNDS UNDER ASSIGNMENT** for the benefit of creditors, any creditor who has a claim against the fund, but who is not a nominal party to the suit, may make himself a party thereto in fact by coming in and presenting his claim under the decree and submitting himself to the jurisdiction of the court. *Id.*

ATTACHMENTS.

1. **JUDGMENT SHOULD NOT BE ENTERED AGAINST GARNISHER**, unless it appear affirmatively that at the time of the garnishment the defendant had a cause of action against the garnishee for the recovery of a legal debt, due or to become due, and such judgment would be available to the garnishee as a defense against any action afterwards brought against him on the debt in respect of which he is charged. *Mims v. West*, 379.
2. **DEBT NOT DUE IS SUBJECT TO GARNISHMENT.** *Id.*

3. **MAKER OF PROMISSORY NOTE CANNOT BE CHARGED AS GARNISHEE OF PAYEE** under process served before the maturity of the note, unless it be affirmatively shown that prior to the rendition of the judgment the note had become due, and was then still the property of the payee. *Id.*
 4. **BONA FIDE PURCHASER OF PROMISSORY NOTE FROM PAYEE, FOR VALUE AND BEFORE MATURITY, IS NOT AFFECTED BY GARNISHMENT PROCESS** served upon the maker of the note in an action against the payee, although the payee was the owner of the note at the time of the service of the process. *Id.*
 5. **GARNISHEE IS NOT CHARGABLE WITH INTEREST UPON FUNDS IN HIS HANDS** unless it be shown that he used the money for which he is liable. And this rule is not changed by a statutory provision that the garnishee may exonerate himself from liability by paying the money into the hands of the sheriff. *Moore v. Lourey*, 790.
 6. **CLERK OF COURT IS BOUND TO ISSUE WRITS OF ATTACHMENT IN ORDER IN WHICH THEY ARE DEMANDED;** but if the party who makes the prior demand is not in attendance to receive his writ when ready, the clerk is not bound to delay the issuing of other writs against the same party which may have been demanded in the mean time. *Lick v. Madden*, 175.
 7. **CLERK OF COURT IS BOUND TO ISSUE WRIT OF ATTACHMENT TO NEXT COMER,** after having prepared for delivery the writ first demanded; and if in such case the first-comer is not present to receive his writ when prepared, and the next comer obtains his writ first, and thus acquires a priority, the clerk is not liable for a loss sustained thereby to the first-comer. *Id.*
 8. **CLERK OF COURT IS GUILTY OF TECHNICAL BREACH OF OFFICIAL DUTY IN FIRST ISSUING WRIT OF ATTACHMENT SECONDLY DEMANDED;** but if he has the writ first demanded prepared and ready for delivery when it is called for, he is not liable for the damages sustained by the first party because the second obtains the first levy. *Id.*
 9. **ACTION AGAINST SHERIFF TO RECOVER POSSESSION OF PERSONAL PROPERTY SEIZED UNDER ATTACHMENT MAY BE DEFEATED** by showing that the defendant in attachment transferred the property attached to the plaintiff with intent to hinder, delay, and defraud his creditors, and that such defendant, during the pendency of the action, and before a trial thereof, was declared a bankrupt, and the sheriff, on demand of the assignee in bankruptcy, delivered the property to such assignee. *Bolander v. Gentry*, 162.
- See BANKRUPTCY; EXECUTORS AND ADMINISTRATORS; SHERIFFS; SURETSHIP.**

ATTAINDER.

See IMPRISONMENT.

ATTORNEY AND CLIENT.

1. **AT COMMON LAW, COURTS HAD NO POWER TO ADMIT ATTORNEYS OR COUNSELORS TO PRACTICE.** All parties had to appear in person. History and practice as to appointment and admission of attorneys stated. *State v. Kirke*, 314.
2. **AT COMMON LAW, COURTS HAD POWER TO DISBAR ATTORNEYS AFTER ADMISSION,** when guilty of such conduct as would justify it. The power to admit is one thing, and the power to disbar another. *Id.*

3. **STATUTES OF FLORIDA REGULATING ADMISSION OF ATTORNEYS DO NOT AFFECT POWER OF COURTS TO DISBAR THEM.** Such a power is inherent in courts, and is essential to the maintenance of their own dignity, and the respectability of their officers. *Id.*
4. **COUNTY COURT OF FLORIDA HAS POWER TO DISBAR ATTORNEY, AND TO DENY HIM** the rights of an officer of that court; but its judgment extends only to a denial of an attorney's privileges in that court. It does not directly affect his rights in other courts. *Id.*
5. **WHILE AUTHORITY OF COURTS TO DISBAR ATTORNEYS SHOULD REMAIN UNIMPAIRED,** PROTECTION SHOULD BE GIVEN ATTORNEYS against a wrongful exercise of this power; and the supreme court will interpose when the inferior court has decided erroneously on the testimony, and a plain case of wrong and injustice is brought to its attention. *Id.*
6. **PROPER COURSE OF PROCEEDING TO HAVE ATTORNEY DISBARRED IS TO PRESENT CHARGE TO COURT,** and it will direct a rule to show cause why the name of the attorney should not be stricken from the roll, if a case proper for the action of the court is presented. This rule is awarded, served, and returned, and the court hears and determines the matter according to law. *Id.*
7. **REGULAR COMPLAINT AGAINST ATTORNEY OUGHT NOT TO BE RECEIVED AND ACTED ON UNLESS MADE ON OATH;** and the charge made should be specific and particular, so that the officer may be aware of the precise nature of the accusation he is to meet. *Id.*
8. **ATTORNEY AT LAW HAS NO LIEN FOR HIS COMPENSATION UPON REAL ESTATE RECOVERED BY HIM** for his client in ejectment, or any other action, either at law or in equity. *Humphrey v. Browning*, 446.
9. **ATTORNEY AT LAW IN SOME STATES HAS LIEN, FOR HIS TAXABLE COSTS ALLOWED BY STATUTE, UPON JUDGMENT** recovered for his client, but he has no such lien for his fees. *Id.*
10. **LAW DOES NOT ENCOURAGE SECRET LIENS, SUCH AS ATTORNEYS' LIENS WOULD BE.** Neither a mechanic's lien nor the equitable lien of a vendor of land for the purchase price is favored in law. *Id.*

See MANDAMUS, 5, 7; NOTARIES.

BANKRUPTCY.

ASSIGNEE IN BANKRUPTCY UNDER LAWS OF UNITED STATES IS ENTITLED TO POSSESSION OF PROPERTY transferred with intent to hinder, delay, and defraud creditors as against both the transferee and the sheriff who subsequently attaches the property in such transferee's hands as belonging to the bankrupt. *Bolander v. Gentry*, 162.

BANKS AND BANKING.

1. **PROMISE BY BANK TO PAY CHECK DRAWN BY PERSON FOR PURCHASE OF CARGO OF CORN** communicated to the seller by the purchaser and by the bank, and relied upon by the seller in taking the purchaser's check, sufficiently identifies the check, and will support an action for the breach of a promise to accept. *Nelson v. First Nat. Bank*, 510.
2. **BANK IS NOT LIABLE ON PROMISE TO PAY CHECK,** unless the promise comes to the knowledge of the payee, and he takes the check upon the faith thereof. *Id.*

See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4, 5; NEGOTIABLE INSTRUMENTS, 1.

BASTARDY.

See WITNESSES, 6.

BONDS.

1. **BOND OF DEPUTY COLLECTOR OF INTERNAL REVENUE**, executed before the passage of the internal revenue act of June 30, 1864, covered all taxes assessed and collected under the previous act of July 1, 1862, whether the same were collected before or after the act of June 30, 1864; and whether it extended to taxes collected under the latter act is a question not material in this case as between the sureties and the obligee of the bond, since the sureties on this bond, and those on a bond executed after the passage of the latter act, have themselves settled the matter of the appropriation of the payments to be made, by their indorsements on the bonds of the sums agreed upon, and have provided, by their concurrent agreement, for the final adjustment of their respective liabilities upon them. *Pickering v. Day*, 291.
2. **TO RELIEVE SURETY ON OFFICIAL BOND FROM LIABILITY** on the ground that the obligee has concealed a defalcation on the part of the principal, the concealment must be active or industrious, and therefore fraudulent in its character. Mere passiveness on the part of the creditor in not enforcing his remedy will not of itself discharge the surety; nor will failure or neglect to give notice to the surety of the principal's defalcation have that effect. *Id.*
3. **SURETIES ON BOND OF DEPUTY COLLECTOR OF INTERNAL REVENUE** are not relieved from liability because of the collector's failure to discharge him immediately upon the discovery of his defalcation, especially where the sureties suffered no detriment by his continuance in office. Nothing less than fraud, actual or constructive, on the part of the collector could relieve them from their responsibility. *Id.*
4. **IT IS FRAUD ON SURETIES OF DEPUTY COLLECTOR OF INTERNAL REVENUE**, and they are discharged from liability, if the collector consents to his using the public money in his private business of buying and speculating in grain, wherefrom a defalcation on his part results. *Id.*

See CONTRACTS, 6-9.

CHAMPERTY.

CONVEYANCE OF LAND PENDING SUIT TO SET ASIDE DEED thereof is not void for champerty, if it is made to one who had no connection with or knowledge of the action. *Rowe v. Beckett*, 676.

CITIZENSHIP.

See CORPORATIONS, 9-11.

CLOUD ON TITLE.

See EQUITY, 7, 8.

COLLATERAL SECURITY.

See ASSIGNMENTS, 3; PLEDGE, 1.

COMMON CARRIERS.

1. **IN INDIANA, EXPRESS COMPANIES ARE COMMON CARRIERS.** *American Express Co. v. Hockett*, 691.

2. **COMMON CARRIERS BY LAND ARE BOUND TO DELIVER GOODS TO CONSIGNEE** at his residence or place of business, where, from the nature of the parcels, this is the more appropriate place for their delivery. It is not sufficient for the carrier to leave them at his public office, unless by express permission, or by a usage so established and well known as to be equivalent to such permission. *Id.*
3. **LIABILITY OF COMMON CARRIER ENDS IF CONSIGNEE IS ABSENT**, and the carrier cannot, after diligent inquiry, find him or ascertain his place of residence or business; but it is still the duty of the carrier to take care of the goods by holding them himself, or by depositing them with some suitable person for the consignee, and in such case the person holding the goods becomes the bailee of the owner or consignee, and is bound only to reasonable diligence. *Id.*
4. **EXPRESS COMPANY IS LIABLE FOR GOODS STOLEN FROM ITS OFFICE**, unless it makes diligent inquiry to find the person to whom it is bound to deliver them, or exercises reasonable care to preserve them, upon its failure, after the exercise of due diligence, to find the consignee. *Id.*
5. **COMMON CARRIER — LIMITATION OF LIABILITY BY NOTICE STAMPED ON BAGGAGE-CHECK.** — Where a passenger upon a railroad train delivered his baggage to the company to be transported to his destination, and received a baggage-check in return, upon which was stamped a notice that in consideration of free carriage the company's liability in case of loss of the baggage was limited to one hundred dollars, if the baggage is lost, this notice does not exempt the company from liability above that amount, as this result could only be attained by a special contract, which this notice does not amount to. *Indianapolis etc. R. R. Co. v. Cox*, 640.
6. **COMMON CARRIER CANNOT BY NOTICE LIMIT HIS LIABILITY** for a loss resulting from his want of care. *Id.*
7. **COMPENSATION FOR CARRIAGE OF BAGGAGE IS INCLUDED IN PASSENGER'S FARE.** *Id.*
8. **WHERE EMPLOYEE OF COMMON CARRIER UPON BEING ASKED** if plaintiff's goods had arrived replied that they had not, when in truth they had, the company will be liable for the direct consequences of this false answer. *Jeffersonville R. R. Co. v. Cotton*, 656.
9. **WHERE COMMON CARRIER TRANSPORTED GOODS TO THEIR DESTINATION**, and after keeping them a few days deposited them in a warehouse, and the owner called a few days later and inquired if the goods had arrived, and was informed by an employee of the carriers that they had not, and a few days later the goods were burned, the carrier is liable for their loss, if it was the direct result of the false answer, and the jury having found that it was, their finding will not be disturbed. *Id.*

See RAILROADS.

CONSTITUTIONAL LAW.

1. **UNION OF STATES IS PERPETUAL** and indissoluble, and no state has the right to secede therefrom. *Chancely v. Bailey*, 350.
2. **SUPREME COURT OF UNITED STATES** is the chosen arbiter to determine such disputes and controversies as may arise between the respective states. *Id.*
3. **ULTIMATE POLITICAL SOVEREIGNTY** of the government created by the federal constitution resides in the United States of America. *Id.*
4. **SOVEREIGNTY IS INDIVISIBLE AND UNALIENABLE.** *Id.*
5. **POWERS GRANTED TO FEDERAL GOVERNMENT** by the states, as expressed in the constitution, vest in that government, with respect to such powers,

the supreme, irresistible, absolute, uncontrolled authority over the people of the respective states, so as to act efficiently and directly upon them as individuals. *Id.*

6. STATE HAS SAME UNDENIABLE AND UNLIMITED JURISDICTION over all persons and things within its limits as any foreign nation, unless such jurisdiction was withheld or limited by the federal constitution. *Id.*
7. SOVEREIGNTY IS THAT PUBLIC AUTHORITY which commands in civil society, and orders and directs what each citizen is to perform to obtain the end of its institution. *Id.*
8. GREAT OBJECT OF GOVERNMENT IS TO PROTECT LIFE, LIBERTY, AND PROPERTY of the citizen, and in the pursuit of that object all interests should be protected, and no one branch of business or interest be permitted to injure or destroy others. *Toledo R. R. Co. v. Harmon*, 489.

CONTINUANCE.

See PLEADING AND PRACTICE, 1.

CONTRACTS.

1. IN MASSACHUSETTS, AND ELSEWHERE, ONE MAY MAKE NAME AND SIGNATURE OF ANOTHER VIRTUALLY HIS OWN, by using it or allowing it to be used in the course of his business; and where a party adopts a name, he will be holden by contracts executed in such name, whether the name so assumed be an artificial one or the proper name of a living person. *Pease v. Pease*, 225.
2. IN PRINCIPLE, THERE IS NO DIFFERENCE BETWEEN ASSUMING PURELY ARTIFICIAL NAME, by which to transact business, and assuming the proper name of some other natural person; only this, that in the latter case the proof ought to be very clear to show that the contract was not designed to be the personal contract of such natural person. *Id.*
3. PROMISE BY ONE PERSON TO ANOTHER TO PAY LATTER'S INDEBTEDNESS TO THIRD PERSON may be enforced in equity by such third person, although he was not a party to the agreement. And if the promise be accepted by such third person, he may maintain an action thereon at law. *Davis v. Calloway*, 670.
4. UNTIL AGREEMENT MADE FOR BENEFIT OF THIRD PERSON IS ACCEPTED by him, the parties thereto may rescind it. *Id.*
5. PROMISE IS SUFFICIENT CONSIDERATION for a promise. *Id.*
6. BOND UNDER SEAL FOR PAYMENT OF MONEY, THOUGH WITHOUT CONSIDERATION, creates a perfect obligation, both at law and in equity, and is impeachable only for fraud. *Garden v. Derrickson*, 286.
7. SEAL ON VOLUNTARY BOND IMPORTS CONSIDERATION, and gives to the instrument, in the absence of fraud, the effect of a bond executed for a consideration. *Id.*
8. VOLUNTARY BOND UNDER SEAL FOR PAYMENT OF MONEY IS ENFORCEABLE as a debt against the obligor, and all volunteers claiming under him. *Id.*
9. WHERE OBLIGOR IN VOLUNTARY BOND UNDER SEAL CONVEYS ALL HIS REAL ESTATE without consideration, a judgment recovered on the bond is in equity a charge upon the land in the hands of the grantees. *Id.*
10. CONTRACT TO SERVE AS SUBSTITUTE IN WAR OF REBELLION against the United States, made by a citizen of Georgia, was null and void, and no recovery can be based thereon. *Chancely v. Bailey*, 350.

11. AGREEMENT IN GENERAL OR TOTAL RESTRAINT OF TRADE IS VOID, although it be founded on a legal and valuable consideration; but an agreement in partial restraint of trade, restricting it within certain reasonable limits, or confining it to particular persons, if founded on a good and valuable consideration, is valid. *Wright v. Ryder*, 186.
12. AGREEMENT IN RESTRAINT OF TRADE THROUGHOUT ENTIRE AREA OF STATE IS UNREASONABLE AND VOID, as against public policy. *Id.*
13. COVENANT APPLIES NOT ONLY TO EXISTING ROUTES OF TRAVEL, but to all new routes afterwards opened, where it is not to run or employ, or suffer to be run or employed, a certain steamboat "upon any of the routes of travel on the rivers, bays, or waters of the state of California for the period of ten years." *Id.*
14. COVENANT BY VENDEE WITH VENDOR OF STEAMBOAT IS IN UNREASONABLE RESTRAINT OF TRADE AND VOID, where it is that the vendee will not run or employ, or suffer to be run or employed, such boat "upon any of the routes of travel on the rivers, bays, or waters of the state of California for the period of ten years." *Id.*
15. WHEN PARTIES ENTER INTO CONTRACT TO BE PERFORMED ON SUNDAY by common labor, the contract, as to performance on Sunday, is illegal and void. *Pate v. Wright*, 705.
16. DELIVERY OF FLOUR ON BOARD STEAMBOAT ON SUNDAY in order to avoid liability of delay in getting it to market, occasioned by danger of the closing of navigation, is not a work of necessity. *Id.*

See CORPORATIONS, 11, 12; FRAUD, 1.

CORPORATIONS.

1. POWER TO CREATE CORPORATION IS ATTRIBUTE OF SOVEREIGNTY. *State v. Curtis*, 263.
2. CORPORATION CREATED BY GOVERNMENT OF UNITED STATES IS CREATURE OF FEDERAL SOVEREIGNTY ALONE. It is controllable by the federal government only, and to that government alone is it amenable. *Id.*
3. LEGISLATURE MAY VALIDATE AND CONFIRM CORPORATION and its acts, where it was irregularly organized; and this applies where several corporations, created by the laws of different states, consolidate by authority of the legislatures, but in making the contract of consolidation, fail to pursue the terms of their authority. The confirmation of the contract actually made, by legislative act, recognizes the legal existence of the corporation named in the act. *Racine & M. R. R. Co. v. Farmers L. & T. Co.*, 595.
4. LEGISLATURE HAS SAME POWER TO CONFIRM AND VALIDATE an irregularly organized corporation that it has to bring into existence a new one. *Mitchell v. Deeds*, 621.
5. UNDER PLEA OF NULL TIEL CORPORATION, EXISTENCE OF CORPORATE BODY is proved by showing an organization in fact, and a user thereunder. *Id.*
6. PARTY EXECUTING HIS NOTE TO CORPORATION THEREBY ADMITS its corporate existence; and in order to avoid its payment for want of a party with whom to contract, he must prove that no such body did in fact exist. *Id.*
7. ORIGINAL ARTICLES OF INCORPORATION PROPERLY RECORDED ARE ADMISSIBLE in evidence without a certificate of the clerk that the instrument is "a true copy." *Fortin v. United States W. E. & P. Co.*, 560.

8. CORPORATE EXISTENCE OF PLAINTIFFS IS SHOWN BY EVIDENCE THAT DEFENDANT sold and conveyed to them the land in controversy, and thereby recognized their corporate existence. *Wood v. Kingston C. Co.*, 554.
9. CORPORATION IS NOT CITIZEN WITHIN CLAUSE OF CONSTITUTION declaring that "the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states." *Ducat v. Chicago*, 529.
10. CORPORATION IS CITIZEN IN SENSE TERM IS USED IN PORTION OF CONSTITUTION conferring jurisdiction on the United States courts in cases between citizens of different states. *Id.*
11. POWER OF CORPORATION CREATED IN ONE STATE TO MAKE CONTRACTS and enforce them in another state depends upon the comity between the states; and this comity is the voluntary act of the sovereignty by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. *Id.*
12. CORPORATIONS HAVE ALL POWERS OF ORDINARY PERSONS AS RESPECTS THEIR CONTRACTS, except when they are expressly or by necessary implication restricted; and they have all the powers necessary to carry out powers expressly granted. *Galena v. Corwith*, 557.
13. CORPORATION MAY, IN ABSENCE OF PROVISION to the contrary in the charter, by resolution or by-law, appoint any person its agent for the purpose of transferring or disposing of its property or negotiable securities; but no officer of the corporation possesses such power exclusively, unless by virtue of some provision of the charter, or some resolution or by-law of the corporation. *Mitchell v. Deeds*, 621.
14. AUTHORITY OF PRESIDENT OF CORPORATION TO DISPOSE OF ITS PROPERTY, or transfer its negotiable securities, may be inferred from evidence that he was in the habit of exercising such power, though neither the charter nor regulations of the corporation expressly confer such power upon him. *Id.*
15. UNDER RESOLUTION OF DIRECTORS OF CORPORATION, authorizing the president to pay off the debts of the corporation, in any securities or other property of the corporation, he has power to assign to a third party, for the purposes expressed in the resolution, a note executed by a debtor to the corporation. *Id.*
16. PRESIDENT OF CORPORATION MAY, WITHOUT EXPRESS AUTHORITY, perform all acts which are incident to the execution of the trust reposed in him, and which custom or necessity imposes upon the office. *Id.*
17. CORPORATION, ACTING WITHIN SCOPE OF ITS AUTHORITY, will be bound by a parol contract made by its authorized agent, to the same extent as an individual would be bound under similar circumstances. *Racine & M. R. R. Co. v. Farmers' L. & I. Co.*, 595.
18. CONSOLIDATION OF STOCK OF CORPORATION created by laws of one state with that of one created in another state will not constitute the corporations thus consolidating one corporation of both or either of the states, but each continues a corporation of the state creating it, although the same persons, as officers and directors, control both as one body. *Id.*
19. IF CORPORATIONS OF DIFFERENT STATES, BY PERMISSION OF LEGISLATURES, CONSOLIDATE into one corporation, and as such mortgage the property belonging to one of the consolidated companies, such mortgage is the sole mortgage of said company, and not of all the consolidated companies, and is legal and valid. *Id.*
20. IN SUIT TO FORECLOSE MORTGAGE, EXECUTED BY CONSOLIDATED CORPORATION consisting of several corporations created by the laws of different

- states, upon the property of one of these companies, the question as to the validity of the consolidation contract cannot be raised by the defendant. Having mortgaged the property, it will not be permitted to deny its own title. *Id.*
21. CONSOLIDATION OF TWO CORPORATIONS INTO ONE NEW ONE ends their separate existence, and vests all their effects and franchises in the new company; and for the purpose of answering for the liabilities of the two companies, the new one shall be deemed to be merely the same as each of its constituents; their existence continued in it under the new form and name, their liabilities still existing as before, and capable of enforcement against the new company the same as if no change had occurred in its organization or name. *Indianapolis C. & L. Co. v. Jones*, 654.
 22. PLEADING. — In action against a consolidated corporation for a liability of one of the companies of which it was formed, the pleadings should aver the facts showing the consolidation in order to avoid a variance. *Id.*
 23. ACCEPTANCE OF CHARTER BY VOLUNTARY SOCIETY SUBJECTS IT TO SUPERVISION of the proper legal authorities having jurisdiction in such cases. *State v. Georgia M. Soc.*, 408.
 24. CORPORATOR IN PRIVATE CIVIL CORPORATION HAS PROPERTY IN FRANCHISE of which he cannot be deprived without due process of law. *Id.*
 25. INCORPORATED MEDICAL SOCIETY, UNDER POWER TO MAKE BY-LAWS CONTAINED IN ITS CHARTER, MAY ADOPT BY-LAW PROVIDING FOR EXPULSION OF MEMBER who shall be guilty of ungentlemanly conduct during a session of the society, or shall conduct himself out of the society in such a manner as would render him ineligible to membership; but the society has not an uncontrollable discretion in its construction and enforcement. *Id.*
 26. VISITORIAL POWER OVER PRIVATE CORPORATIONS, with authority to redress any wrongs which the corporations may inflict upon their members, is vested, in Georgia, in the superior courts of the counties where such corporations are located. *Id.*
 27. CORPORATOR IS ENTITLED TO RELIEF BY MANDAMUS, where he has a clear legal right which has been violated by the corporation, and there is no other adequate legal remedy to enforce it; and this rule has not been changed by section 3143 of the Georgia code. *Id.*
 28. INCORPORATED MEDICAL SOCIETY CANNOT JUSTIFY EXPULSION OF MEMBER for doing that which the law not only authorizes but encourages. *Id.*
 29. PROPERTY OF RELIGIOUS CORPORATION, IN CASE OF SEPARATION, both parties still adhering to the tenets and discipline of the organization, should be divided between them in proportion to their numbers at the time of such separation. *Nicholls v. Rugg*, 462.
 30. RIGHT OF VOTING UPON QUESTIONS AFFECTING PROPERTY OF RELIGIOUS CORPORATION should not be confined to church members, but should also extend to those who have contributed to the support of the church, although not members. *Id.*
 31. PROPER MODE IN MAKING PARTITION OF PROPERTY OF RELIGIOUS CORPORATION, in case of a division, is to count church members by virtue of their membership, and, in addition, to count as members of the congregation all pew-holders. *Id.*
 32. CORPORATIONS ARE ENTITLED TO CHANGE OF VENUE EQUALLY WITH INDIVIDUALS. *Commercial Ins. Co. v. Mehlman*, 543.
 33. ANY RECOGNIZED OFFICER OF CORPORATION MAY MAKE REQUISITE AFFIDAVIT upon application by the corporation for a change of venue, he being regarded as a party to the record *pro hac vice*. *Id.*

34. CORPORATION IS TO BE REGARDED AS "PARTY" WITHIN STATUTE AUTHORIZING "parties" to obtain change of venue, by virtue of a statute declaring that the word "person" or "persons," as well as all words referring to or importing persons, shall be deemed to extend to and include bodies politic and corporate as well as individuals. *Id.*
 35. PROVISION OF CHARTER OF CITY AUTHORIZING IT TO BORROW MONEY, and to issue bonds therefor, and to expend the money in the liquidation of its debts and in improvements, does not prohibit it from funding its existing debt, and issuing bonds therefor, or giving written evidences in any form the parties may agree upon. *Galena v. Corwith*, 557.
 36. MUNICIPAL CORPORATIONS HAVING POWER TO CONTRACT DEBTS MAY PROVIDE FOR THEIR PAYMENT without express authority of charter, in such mode as they and the holders of the indebtedness may agree upon; and they may fund their debts, if that be deemed the best policy, and issue the necessary evidences thereof. *Id.*
 37. ACTION ON CASE WILL LIE AGAINST MUNICIPAL CORPORATION for damages caused by its failure to perform some duty cast upon it by law. *Mayor v. Cullens*, 398.
 38. INDIVIDUAL CORPORATOR MAY SUE MUNICIPAL CORPORATION. *Id.*
 39. MUNICIPAL CORPORATION IS BOUND TO KEEP IN REPAIR PAVEMENT IN FRONT OF STALLS OF MARKET, which it owns, and from which it derives a revenue in the way of rents, although it is unable from lack of funds, without its fault, to repair its streets. *Id.*
 40. COMPLAINT IN ACTION BY DRAINING COMPANY TO RECOVER ASSESSMENT need not state in terms the use for which the money is required, if it be evident from the whole complaint that it was required for the construction of the drains referred to in the directors' order for payment, set out in the complaint. *Large v. Keen's C. D. Co.*, 696.
 41. COMPLAINT IN ACTION BY DRAINING COMPANY TO ENFORCE PAYMENT OF ASSESSMENT against a person not a member of the corporation must describe the commencement, course, and terminus of the drain. But the fact that the company has not procured the right of way will not bar such action. *Id.*
- See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 1, 2; DAMAGES; FRAUD, 5; MANDAMUS, 8; PLEDGE, 1; STATUTE OF LIMITATIONS, 5-8; TAXATION, 4, 5.

COSTS.

1. ACT AUTHORIZING FIVE PER CENT DAMAGES TO BE TAXED AS COSTS against the losing party in litigated cases in San Francisco operates equally and uniformly upon all parties upon whom it operates at all, and is constitutional. *Corwin v. Ward*, 93.
2. TO SAVE COSTS, DEFENDANT MUST KEEP HIS TENDER GOOD BY ACTUALLY PRODUCING the money, and depositing it in court. And it is too late where the amount tendered before suit is not deposited in court until after the trial has begun, and after the accrual of costs not embraced in the amount tendered. *Warrington v. Pollard*, 727.

See ATTORNEY AND CLIENT, 9; TAXATION, 1.

CO-TENANCY.

1. CONVEYANCE OF SPECIFIC PORTION OF COMMON LANDS BY ONE TENANT IN COMMON, or by any number of them less than the whole, is not void, but cannot be made to the prejudice of the co-tenants not uniting in the conveyance. *Gates v. Salmon*, 139.

2. **GRANTEE ACQUIRES, UNDER CONVEYANCE BY ONE TENANT IN COMMON IN SPECIFIC PORTION** of the common lands, all the interest of his grantor therein, which interest is a tenancy in the special tract with the co-tenants of his grantor. *Id.*
3. **CONVEYANCE BY ONE TENANT IN COMMON OF SPECIAL PORTION OF COMMON PREMISES** does not sever the special tract from the general tract of which it is a part, so far as the co-tenants of the grantor are concerned, and as it regards them, the whole tract is subject to partition the same as it would be had the conveyance of the special tract not been made. *Id.*
4. **TENANT IN COMMON REMOVING ENCUMBRANCE FROM ESTATE** is entitled to contribution from his co-tenants to the extent of their respective interests, and a court of equity, to secure such contribution, will enforce upon the interests of the latter an equitable lien of the same character as that which has been removed. *Titsworth v. Stout*, 577.
5. **TENANT IN COMMON BUYING OUTSTANDING TITLE TO COMMON PROPERTY** will not be permitted to set it up against his co-tenant until he has given him an opportunity to contribute, and thereby to participate in the benefits of the purchaser. *Id.*
6. **IN SUIT FOR PARTITION AGAINST CO-TENANT WHO HAS REMOVED ENCUMBRANCE** from the common property, and has set up and proved such fact without filing a cross-bill for affirmative relief, a decree for sale of the premises, in the event of non-payment of his claim, cannot properly be rendered, but the decree should, under the Illinois statute of 1861, be that the petitioner take his allotment subject to the defendant's lien for one half of the money paid for the removal of the encumbrance. *Id.*

See PARTITION.

CRIMINAL LAW.

1. **INDICTMENT IS SUFFICIENT**, if it be so plainly drawn that the nature of the offense may be easily understood by the jury. *Cross v. People*, 474.
2. **OBJECTION FOR VARIANCE MUST BE TAKEN AT TRIAL**. It is too late to make it on error. *Id.*
3. **CHEATS AND FRAUDS**, to what extent indictable at common law. *People v. Garrett*, 125.
4. **TO JUSTIFY CONVICTION FOR STATUTORY OFFENSE OF SELLING LAND TWICE**, it is necessary to charge in the indictment, and prove at the trial, the first and second sales, barter, or disposal of the land, as specified in the statute; and that such second sale, etc., was for a valuable consideration, and was made fraudulently, — that is, with intent to defraud either the first or second purchaser. *Id.*
5. **SAME — WHEN SECOND SALE NOT FRAUDULENT**. — In such case, the second sale is not fraudulent within the meaning of the statute, if made to parties at their request, and after being fully informed by the grantor of the fact and the tenor of the first sale.
6. **IT NEED NOT BE AVERRED IN INDICTMENT FOR FORGING BANK CHECK** that the instrument alleged to have been forged had the proper revenue stamp attached; and a conviction under such an indictment would be good, without proof of such fact, if the instrument was proved to be false and forged, and made with the intent charged. *Cross v. People*, 474.
7. **INDICTMENT FOR FORGING PAPER PURPORTING TO HAVE BEEN MADE BY AGENT**, in the name of his principal, need not aver the authority of the agent, or that it was so drawn; setting out the instrument *in hoc verba*,

- with an allegation that it was made with the intent to defraud the party whose name is signed to it, is sufficient under the statute. *Id.*
8. OMISSION IN INDICTMENT FOR FORGING BANK CHECK, set out *in hęc verba*, of the figures denoting the number of the check, and also of the letter "C" written under the signature, is not variance. *Id.*
 9. FOR PURPOSE OF IDENTIFYING PARTY AND TRANSACTION, and as *res gestę*, evidence, on the trial of a party indicted for forgery, of another forgery committed by him, at the time of the commission of the offense for which he was on trial, is competent. *Id.*
 10. IN CASE OF HOMICIDE, MALICE MAY BE IMPLIED from any unlawful act dangerous to life, committed without lawful justification. *State v. Moore*, 776.
 11. CRIME OF MURDER IS ESSENTIALLY SAME UNDER IOWA STATUTE AS AT COMMON LAW, and death caused by an unlawful attempt to procure an abortion is murder, although there was no intent to cause the death of the woman. *Id.*
 12. IT IS MURDER IN SECOND DEGREE, UNDER IOWA STATUTE, to cause death in the procurement of a willful abortion, and in a prosecution therefor, it is error to instruct the jury that the defendant may be convicted of manslaughter. *Id.*
 13. DECLARATION OF PERSON CHARGED TO HAVE BEEN MURDERED, made before leaving home, that he intended soon to leave, and never make himself known to or be heard from by his family, is not admissible on the trial for the murder, though the defendant claims that the body found was not the body of that person. *State v. Vincent*, 753.
 14. BURDEN OF PROVING THAT PERSON CHARGED AS MURDERED WAS ALIVE at the time of the alleged murder, after *prima facie* proof that the body found was his, is upon the prisoner, and the evidence, as in the case of proving an *alibi* of the prisoner, must outweigh the evidence of the prosecution. *Id.*
 15. ON TRIAL FOR HOMICIDE COMMITTED WHILE DECEASED AND PRISONER WERE ON JOURNEY TOGETHER, evidence of statements of the deceased while engaged in the journey, about where they had come from, and where they were going, are admissible as part of the *res gestę*, though not made in the prisoner's presence. *Id.*
 16. DECLARATIONS BY DECEASED WHILE REALIZING HIMSELF TO BE IN DYING CONDITION, concerning the circumstances attending the receipt of his fatal wounds, though made early in the morning, and his death did not occur until the middle of the afternoon of the same day, are admissible in evidence against the defendant, on trial charged with the murder of the deceased. *People v. Vernon*, 49.
 17. FACT THAT WRITTEN STATEMENT OF DECLARATIONS MADE BY DECEASED IN EXTREMIS, verified by him, was read in evidence on the trial of the party thereby accused of murder, is no objection to the introduction of other and independent evidence of the same or similar declarations. *Id.*
 18. IMPEACHING EVIDENCE, TIME OF OBJECTING. — Where, in a criminal prosecution, the defendant introduces witnesses to impeach certain witnesses sworn by the state by attacking their general character, the state may in turn introduce witnesses to attack the character of the impeaching witnesses of the defense, *semble*. At all events, objection to the admissibility of such evidence must be made before it is admitted, and cannot be made afterwards. *State v. Moore*, 776.

19. **WIFE OF ACCOMPLICE IS COMPETENT WITNESS** in a criminal prosecution, and the weight of her testimony is for the jury. *Id.*
20. **ACCOMPLICE IS ONE WHO IS IN SOME WAY CONCERNED IN COMMISSION OF CRIME**, though not as a principal, and this includes all persons who have been concerned in its commission, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. *Cross v. People*, 474.
21. **LEGAL CONVICTION MAY BE HAD** upon the uncorroborated testimony of an accomplice. *Id.*

CURTESY.

ESTATE BY CURTESY, PRIOR TO ILLINOIS MARRIED WOMAN'S ACT OF 1861, CONFERRED a present existing right, giving the owner authority to use and enjoy it until it became extinct. *Clark v. Thompson*, 457.

DAMAGES.

1. **EXEMPLARY DAMAGES ARE NEVER ALLOWED** except where gross fraud, malice, or oppression are shown; and in the absence of these elements, damages should be confined strictly to compensation for the injury sustained. *Chicago v. Martin*, 590.
2. **COMPENSATORY DAMAGES FOR CAUSING PERSONAL INJURIES** are to be measured by the loss of time during the cure, the expense incurred in respect thereto, the pain and suffering undergone by the plaintiff, and the pecuniary loss consequent upon any permanent injury. *Id.*
3. **MUNICIPAL CORPORATIONS ARE LIABLE FOR COMPENSATORY DAMAGES** only, except in cases of malice or willful negligence, which elements, it seems, can scarcely be attributed to such bodies. *Id.*
4. **MUNICIPAL CORPORATIONS MAY EXERCISE DISCRETION** as to the time of making repairs in streets which are little used by the public, and are not in a business portion of the city; and in an action for damages for a personal injury sustained by a traveler upon such a street, by reason of a defect therein, the corporation cannot be held guilty of gross negligence so as to subject it to liability for exemplary damages because of its mere failure to make the necessary repairs. *Id.*

See INTEREST.

DEBTOR AND CREDITOR.

See FRAUD.

DEDICATION.

1. **TO SHOW DEDICATION, BY USER, OF LAND OF INDIVIDUAL, to a public use**, it must have been a user by the public adverse to and exclusive of the use and enjoyment of the property by the proprietor, and not a mere use by the public under and in connection with its use by the owner in any manner desired by him. *Talbot v. Grace*, 704.
2. **WORDS "GARDEN SQUARE" MARKED ON BLOCK IN TOWN PLAT** do not necessarily imply dedication of the block. The words are equivocal, and resort must be had to extraneous circumstances to discover what was intended thereby; and they were in this case insufficient to establish a dedication, especially after a lapse of eighteen years from the period of the supposed dedication, during all of which time the defend-

ant's acts and conduct were wholly inconsistent with a dedication to public use. *Pella v. Schöke*, 729.

3 ONUS IS ON PUBLIC TO ESTABLISH DEDICATION. *Id.*

See STATUTE OF LIMITATIONS, 6.

DEEDS.

1. TO RENDER DEED ADMISSIBLE IN EVIDENCE, acknowledgment must show where it was made and certified, or the court must be able, by taking the acknowledgment and deed together, to presume in what state it was taken. Thus where the venue to a certificate of acknowledgment is simply "County of New York," and there is nothing in the certificate nor in the deed indicating in what state the acknowledgment was taken, the acknowledgment is insufficient, and the deed not admissible in evidence. *Hardin v. Kirk*, 581.

2. WORDS "RELEASE, REMISE, AND FOREVER QUITCLAIM" USED IN DEED of land pass a title in fee to the alienee. *Ross v. Beckett*, 676.

See EXECUTIONS, 11, 12.

DOMICILE.

TEMPORARY RESIDENCE ONLY IS SHOWN BY FACTS OF THIS CASE. A temporary residence in a state does not change its character by being long continued; and the fact of voting in the state is not necessarily decisive of the character of the residence. *Easterly v. Goodwin*, 237.

DOWER.

See WILLS, 7.

EJECTMENT.

1. ALL WHO COME INTO POSSESSION OF LAND AFTER ACTION BROUGHT MUST, PRIMA FACIE, GO OUT under writ of possession, if the plaintiff recovers; for the presumption is, that they came in under the defendant. *Wetherbee v. Dunn*, 166.
2. ONE WHO COMES INTO POSSESSION OF LAND UNDER JUDGMENT COLLUSIVELY OBTAINED AGAINST DEFENDANT in an action to recover possession of the land, pending the action, must go out under a writ of possession against the defendant. *Id.*
3. ONE WHO ENTERS UNDER DEFENDANT IN EJECTMENT, AFTER SUIT COMMENCED, TAKES AND HOLDS the possession subject to the judgment to be rendered in the suit, though not made a party to it. *Oetgen v. Ross*, 468.
4. LANDLORD CANNOT BE SAID TO HOLD UNDER HIS TENANT, where he resumes possession of the demised premises after the commencement of a suit in ejectment against his tenant, and after the term has expired. *Id.*
5. ILLINOIS EJECTMENT ACT REQUIRES TENANT SUED IN EJECTMENT TO NOTIFY his landlord, under a penalty for not doing so; and the landlord can appear and defend in the name of his tenant, or may be made a co-defendant in the suit. After such notice, and an opportunity to defend, the landlord will be concluded by a judgment for the plaintiff, and liable to be evicted, if the premises have been surrendered to him, though the judgment may have been only against the tenant, in name. *Id.*

6. LANDLORD, TO WHOM TENANT HAS SURRENDERED POSSESSION PENDING SUIT IN EJECTMENT against the latter, cannot be evicted by a writ of possession issued on the judgment against the tenant, where he had no notice of the pendency of the suit, and was chargeable with no fault or laches. In such case, the writ should be stayed, on the motion of the landlord, until he can be made a party to the existing suit, and a trial be had upon the merits. *Id.*
7. IN DETERMINING QUESTION OF LACHES ON PART OF LANDLORD, IN NOT MOVING at an earlier day to set aside a judgment by default in ejectment taken against his tenant, after he had knowledge of it, the fact that up to the time of making his motion no writ of possession had been issued should be taken into the account. *Id.*
8. WHETHER PLAINTIFF IN EJECTMENT WHO FAILS TO TAKE OUT HIS WRIT OF POSSESSION for a year after judgment is entitled to it without a special order, *quere. Id.*
9. COURT THAT RENDERS JUDGMENT IN EJECTMENT SUIT EXERCISES a species of equitable jurisdiction over the writ of possession, recalling it if justice requires, and sometimes, after execution, awarding a writ of restitution. *Id.*
10. UNDER DECLARATION IN EJECTMENT FOR ENTIRE PREMISES, an undivided interest cannot be recovered. *Hardin v. Kirk*, 581.
11. IN ACTION OF EJECTMENT FOR WHOLE PREMISES, plaintiff will not be permitted to establish title to a less interest; and hence a deed offered for that purpose is properly excluded. *Id.*
12. WHERE SEVERAL SEPARATE ACTIONS OF EJECTMENT ARE BROUGHT against the same defendant, at the same term of court, for the same land and by different attorneys, both being docketed as one suit, the plea being so entitled and filed, and the docket entries showing that it was so treated by the parties, the court will be justified in the inference that they were consolidated by consent; and the defendant's motion, made after hearing the evidence, that the court require the plaintiffs to elect upon which declaration they will proceed, comes too late, and the court will not err in denying the motion. If, however, the court grants the motion, and it appears that the evidence does not establish a right to recover on the part of the plaintiff whose declaration was excluded, the court commits no error, its action operating as though the court had rendered judgment against him, which it could properly have done under the circumstances. *Id.*
13. UNDER ILLINOIS STATUTE CONCERNING ACTIONS OF EJECTMENT, which provides that "the declaration may contain several counts, and several parties may be named as plaintiffs jointly in one count, and separately in others," parties may sue jointly, and proceed jointly in one count, for the land, and each separately in other counts, and either for the whole, a part, or for a separate and undivided interest, but parties cannot bring separate actions, and be required to consolidate them without their consent. *Id.*
14. PLAINTIFF IN ACTION OF RIGHT MUST RECOVER UPON STRENGTH OF HIS OWN TITLE, and not upon the weakness of his adversary's. He must show the legal title to be in himself. *Huntington v. Jewett*, 788.
15. IN ACTION FOR RECOVERY OF REAL PROPERTY, PLAINTIFF CAN ONLY RECOVER ON LEGAL TITLE to the possession paramount to the legal or equitable title of the defendant. *Rouse v. Beckett*, 676.

16. **RECOVERY IN EJECTMENT MUST BE ACCORDING TO CLAIM** made in the declaration. The plaintiff cannot recover a different estate from that claimed, nor can he recover an undivided interest when he counts for the whole. *Clark v. Thompson*, 457.

EQUITY.

1. **JURISDICTION IN CHANCERY OF DEFENSE AT LAW.** — Where the holder of a note executed with a power of attorney to confess judgment procures judgment thereon in a foreign county, without notice to the debtor, the latter will not be precluded from resorting to a court of chancery, although the ground of relief sought in chancery could have been made available in a suit at law, if the debtor had had notice of the pendency of the proceedings. *Cooper v. Tyler*, 442.
2. **SWORN ANSWER OF DEFENDANT TO BILL IN EQUITY IS EVIDENCE** in his favor equal in weight to the testimony of a single witness, and is not to be discredited, nor any presumption raised against it, by reason of its being the answer of an interested party; and the answer is sufficient in itself if direct and positive and responsive to the bill, to establish the denials and the affirmations of facts which it contains, if not outweighed by opposing proof. *Pickering v. Day*, 291.
3. **TO OVERCOME ANSWER OF DEFENDANT TO BILL IN EQUITY**, it is not indispensable in all cases to have the testimony of a witness with corroborative circumstances; because circumstances alone may sometimes be found in the answer itself, or in documentary evidence referred to in the answer sufficient to more than countervail the denials of the answer. The rule properly applies to the case of an answer opposed only by the testimony of a single witness. *Id.*
4. **WITNESS RELIED ON TO OVERCOME ANSWER TO BILL IN EQUITY** must not only be competent, but his testimony must be credible; and the circumstances depended upon as corroborative must be such as to materially support the witness and strengthen his testimony, so that when both are considered together, they may be sufficient to satisfy the conscience of the court that the allegations and charges of the bill are true. *Id.*
5. **ANSWER TO BILL OUGHT NOT TO BE OVERTHROWN** by evidence less positive than the allegations and denials of the answer, nor should it be outweighed by proof of circumstances which may be reconciled with the truth of the statements therein contained. *Id.*
6. **BURDEN OF PROOF AS TO NEW MATTER.** — If the answer to a bill in chancery, by way of affirmative allegations, sets up new matter, not responsive to the bill, the burden is upon the defendant to prove the allegations as charged. *Cooper v. Tyler*, 442.
7. **IN SUIT TO QUIET TITLE, COMPLAINANT IS NOT BOUND TO SHOW** a perfect title against all the world, as in a possessory action. *Rucker v. Dooley*, 614.
8. **IN SUIT TO QUIET TITLE, IT IS PROPER TO DECREE** that the deeds constituting the cloud be set aside and removed; but the court should not decree that the holder of such deed convey his title thereunder to the complainant. *Id.*
9. **WIFE IS ENTITLED TO HAVE TITLE QUIETED IN HER** IN ACTION TO QUIET TITLE brought by the purchaser at execution sale against her and her husband, where the husband conveyed by misdescription to his wife's father, who afterwards conveyed voluntarily to her by the same description; and afterwards a judgment was entered against the husband, in

whom the naked legal title still remained, but he, before execution sale of the land, executed a deed to his wife, reciting therein that it was made to correct the mistakes in the two former deeds; and the heirs of the first grantee are not necessary parties for this purpose. *Thomas v. Kennedy*, 740.

10. WHERE EQUITY WOULD COMPEL GRANTOR TO CORRECT MISTAKE IN DESCRIPTION OF LAND intended to be conveyed, he may do voluntarily what might thus be enforced. *Id.*

See FRAUD, 1; SPECIFIC PERFORMANCE.

ESTATES.

See CURTESY.

ESTATES OF DECEDENTS.

PROBATE COURT HAS NO POWER TO APPROPRIATE SHARE OF HEIR OR DEVISEE to the payment of his debts, even though the debt is in judgment, and the devisee in state prison under a conviction of felony. It can do no more than pay the claims against the estate, and distribute the remainder among the heirs and devisees. *Estate of Noel*, 111.

See PROBATE COURTS; WILLS.

ESTOPPEL.

1. ESTOPPEL—ACQUIESCENCE IN CASE OF MISTAKE.—Patents for certain lands were issued to two persons bearing the same name, and by a mistake in their delivery each got the other's patent, but acquiesced and took the land described in the patents as received by them, and profited out of the same: *held*, that each of them and their representatives were estopped from raising the question of such mistake, and claiming the land of the other. *Gardner v. Ladue*, 557.
2. ONE WHO IS IN POSSESSION OF LAND, CLAIMING IT AS HIS OWN, DOES NOT ADMIT TITLE IN ANOTHER by purchasing the other's claim of title to quiet his own title and avoid litigation. Such purchaser is not estopped by the purchase from denying the validity of the claim thus purchased. *Carmon v. Stockmon*, 205.
3. LAW DOES NOT FAVOR DOCTRINE OF ESTOPPEL, which may be said to be founded upon the adage that "the truth is not to be spoken at all times"; and the doctrine is never to be applied, except where to allow the truth to be told would consummate a wrong to one party or enable the other to secure an unfair advantage. *Franklin v. Merida*, 129.

See LANDLORD AND TENANT, 2-4.

EVIDENCE.

1. IRRELEVANT EVIDENCE SHOULD BE EXCLUDED. A compromise agreement signed by a part only of the creditors of a debtor, including the plaintiff in a subsequent action, and which was to be void unless signed by all, is inadmissible to affect a different agreement afterwards entered into between the plaintiff and the debtor. *Parker v. Benton*, 246.
2. COURTS OF INDIANA MUST TAKE JUDICIAL NOTICE of what is and what is not the public statutory law of the state. *Evans v. Browne*, 710.
3. OBJECTION TO ADMISSIBILITY OF DEPOSITION IN EVIDENCE MUST BE MADE BEFORE ENTERING ON TRIAL, and cannot be made afterwards, where

- the ground of the objection appears upon the face of the deposition. *Robbins v. Lester*, 674.
4. ACTION OF TRIAL COURT IN ADMITTING EVIDENCE WILL BE PRESUMED TO BE RIGHT, in the absence of any proof to the contrary. *Onstott v. Ream*, 695.
 5. WHERE EVIDENCE IS STRICTLY REBUTTING, it is not error for the court to refuse to allow the introduction of testimony in reply. *Id.*
 6. TESTIMONY RULED OUT BY COURT FOR ONE PURPOSE, BUT ADMITTED FOR ANOTHER, can only be considered by the jury for the purpose for which it was received. *Macdougall v. Maguire*, 98.
 7. ALL AFFIRMATIVE ISSUES IN CIVIL CASES ARE TO BE PROVED by a preponderance of evidence. *Mitchell v. Deeds*, 621.
 8. WHERE DECLARATION IN ACTION UPON STIPULATION IN LEASE OF MILL to surrender premises in good condition, accident by fire excepted, charged that the mill was burned by a fire caused by the misconduct and carelessness of the defendant, the court committed no error in refusing to instruct the jury that they could not find a verdict against the defendant unless the evidence was such as would convict him of the crime of arson, and unless they had no reasonable doubt of his guilt, and in giving the instruction that a fair preponderance of proof which satisfied the mind of the jury was sufficient. *Sprague v. Dodge*, 523.
 9. CRIMINAL OFFENSE CHARGED IN PLEADINGS IN CIVIL CASES must be proved beyond a reasonable doubt; but the rule does not apply to cases where the charge of criminality is not made in the pleadings. *Id.*
 10. PRESUMPTION OF INNOCENCE SHOULD BE INDULGED IN CIVIL CASES in which the pleadings do not charge a criminal offense, but either side relies upon establishing a criminal offense against the other, and the presumption can be rebutted only by such evidence as satisfies the mind of the jury. Clearer proof is necessary in such case than in one involving no criminality, but the sufficiency of the proof is to be left to the jury, and the rule of reasonable doubt does not apply. *Id.*
 11. TESTIMONY OF PHYSICIANS THAT IT WOULD BE IMPOSSIBLE FOR ANY ONE TO IDENTIFY a human head after preservation for a certain time in alcohol is not admissible, for it is a conclusion from facts which can be drawn by the jury alone. It would be competent, however, for the witnesses to state the character and nature of the change produced by death, and to explain or illustrate to what extent these changes had operated upon the head in question. *State v. Vincent*, 753.
 12. DECLARATIONS SPRINGING OUT OF PRINCIPAL TRANSACTION ARE TO BE REGARDED as contemporaneous with it, and are admissible in evidence as part of the *res gesta*, if they tend to explain the principal transaction, and were voluntarily made at a time so near to although not precisely concurrent with it as to preclude the idea of deliberate design. *People v. Vernon*, 49.
 13. DECLARATIONS OF VOLUNTARY GRANTOR, MADE DURING GRANTOR'S ABSENCE AND WITHOUT HIS KNOWLEDGE, that he was insolvent when the deed was made, are not admissible against the grantee for the purpose of showing the conveyance to be fraudulent against creditors. *Redfield v. Buck*, 241.
 14. ACTS OF OWNERSHIP AND DECLARATIONS OF GRANTOR REMAINING IN POSSESSION, ADMISSIBILITY OF IN EVIDENCE. — Where a grantor remains in possession and manages the property as before, and the question is whether he is occupying as owner or as agent of the grantee, his acts of

ownership are admissible in evidence against the grantee, and his declarations made in connection with them are also admissible as explanatory of them. *Id.*

15. DYING DECLARATIONS OF PERSON KILLED ARE NOT ADMISSIBLE TO CHARGE DEFENDANT, in an action against a railroad company, for negligence in causing the death.
 16. DYING DECLARATIONS OF PERSON KILLED ARE NEVER ADMISSIBLE, EXCEPT IN PUBLIC PROSECUTIONS for felonious homicides. *Id.*
- See ADVERSE POSSESSION, 4; AGENCY, 3; ASSAULT AND BATTERY; CORPORATIONS, 7; CRIMINAL LAW; DEEDS, 2, EQUITY; JUDGMENTS, 6, 7; MALICIOUS PROSECUTION; PARTITION, 3; PLEADING AND PRACTICE.

EXECUTIONS.

1. HOW TO LEVY EXECUTION WHERE DEFENDANT IS PRESENT—WAIVER OF DEFENDANT'S CLAIM OF EXEMPTION. — A sheriff, whenever practicable, should, before he levies an execution, notify the defendant of his having such execution in his hands; and the defendant upon such notice must, if he claims the benefit of the statute exempting from execution his personal property and the land on which he resides until the rest of his property in the county is exhausted, furnish the officer with a description of his other property liable to sale on execution, or he will be considered to have waived his rights under that statute. *People v. Palmer*, 418.
2. EFFECT OF DEFENDANT'S FAILURE TO EXERCISE RIGHT OF SELECTION. — Upon defendant's being notified by the sheriff that the latter has an execution in his hands to levy, the former has a right to select such property as he desires to retain under the statute, surrendering to the officer all his other property not thus selected or specifically exempt, for the satisfaction of the execution; and if the defendant so neglects or refuses to make a selection of property, the officer may proceed to levy upon any of his property not specifically exempt, and sell it, regardless of any claim the defendant may subsequently set up to such property as having been selected by him. *Id.*
3. HOW TO LEVY EXECUTION WHERE DEFENDANT IS ABSENT—DEFENDANT'S RIGHT TO SELECT AFTER LEVY. — Where the defendant is absent from the county while the sheriff has an execution in his hands for service, and cannot therefore be notified, it is the sheriff's duty to make a levy on all of defendant's property not specifically exempt, and the defendant may thereafter make his selection of the very property levied on precisely as he might have done before the levy, provided it was such in quality and value as he might have selected before the levy. But in such case, the defendant should surrender, or offer to surrender, an amount of other property sufficient to satisfy the execution; and neglecting to do this, the officer may proceed with the sale, if the aggregate value of the property levied on and afterwards selected, and that still retained by the defendant and not specifically exempt from execution, exceeds sixty dollars. If it does not exceed this amount, the officer will be liable to the penalty of the statute if he sells such property. *Id.*
4. SHERIFF'S LIABILITY FOR FAILURE TO LEVY EXECUTION—DILIGENCE REQUIRED. — The law requires at least reasonable diligence of a sheriff in levying an execution; and where he receives the writ from a foreign county against a party defendant residing in his county, who is in possession of

land of sufficient value, in excess of the encumbrances upon it, to make the debt, he is guilty of negligence if he fails to make a levy upon the land and to file a certificate of the same in the recorder's office of his county, though the execution plaintiff has not furnished him with any funds to pay the fees for filing and recording the certificate of levy. The sheriff's duty is to levy on the land and make his certificate to the clerk. This will exonerate him, and the question of fees is between the clerk and execution plaintiff. An omission to make the levy, and to make and file the certificate thereof, will deprive the execution plaintiff of his lien on the land. *Id.*

6. FACT THAT SHERIFF IS INFORMED THAT PERSONAL PROPERTY FOUND IN DEFENDANT'S POSSESSION is not the property of the defendant, will not exempt him from liability for not levying an execution upon it, if it afterwards appears that the property at the time was the property of the defendant. *Id.*
6. FAILURE TO LEVY EXECUTION, HOW JUSTIFIED — BURDEN OF PROOF. — If a sheriff fails to make a levy on the personal property in the possession of the defendant, he can only discharge himself from liability by showing that the property was not subject to levy, and the *onus probandi* is upon the officer. *Id.*
7. MEASURE OF DAMAGES AGAINST SHERIFF FOR FAILURE TO LEVY EXECUTION is the actual damages sustained by the execution plaintiff, and such damages may be recovered by an action on the sheriff's official bond. *Id.*
8. REAL ESTATE MAY BE SOLD AND GOOD TITLE THERETO PASSED, IN GEORGIA, UNDER EXECUTION ON COMMON-LAW JUDGMENT levied after the levy of an attachment, but before judgment on the attachment. *Kilgo v. Castleberry*, 406.
9. ONE DEFENDANT HAS RIGHT TO PURCHASE PROPERTY OF CO-DEFENDANT AT EXECUTION SALE on a judgment obtained against them both, and will obtain a good title thereto. *Id.*
10. EQUITY WILL NOT SET ASIDE EXECUTION SALE ON MERE GENERAL CHARGE OF FRAUD, without specification of fraudulent acts. *Id.*
11. STATUTE REQUIRING SHERIFF, ON PRESENTATION OF CERTIFICATE OF PURCHASE of land sold under execution, to execute a deed to the holder thereof, if the land has not been redeemed, must be construed to mean that the deed is to be so executed if such presentation is made within a reasonable time; and such time must be considered to be the time within which the judgment is a lien, and the fifteen months additional allowed for redemption. One seeking a deed after such time must make application to the court in which the execution was issued for a rule upon the sheriff, on notice to the parties interested, to show cause why the deed should not be executed. But if the application be not made within twenty years, the courts will hold, in analogy to the statute of limitations, and for the protection of titles of *bona fide* purchasers, that such lapse of time will bar the right of the holder of the certificate to have a deed executed. *Rucker v. Dooley*, 614.
12. DEED EXECUTED ON APPLICATION TO SHERIFF BY HOLDER OF CERTIFICATE of purchase, twenty-nine years after the sale on execution, will be set aside as a cloud upon the title of the party in possession, where, in the intervening time, the judgment debtor has conveyed the land, and, by several subsequent conveyances, the title has passed to a remote purchaser for value, and without notice of any lien, who has entered into possession prior to the making of the sheriff's deed. *Id.*

13. **PURCHASER OF LAND AT EXECUTION SALE IS BOUND TO TAKE NOTICE** of the condition of the record title up to the time of the sale; and if at that time an instrument is properly indexed, he is affected with constructive notice of all it contains. *Thomas v. Kennedy*, 740.
14. **POSSESSION OF LAND WHICH IS OSTENSIBLY AS MUCH IN HUSBAND AS WIFE** will not impart notice of the equitable title of the wife to a purchaser of the land at execution sale under a judgment against the husband, who held the legal title at the time. *Id.*

EXECUTORS AND ADMINISTRATORS.

AFTER DECREE OF DISTRIBUTION, MONEY OF DISTRIBUTEE IN HANDS OF ADMINISTRATOR MAY BE GARNISHED by a creditor of the distributee, or may be reached by proceedings supplementary to execution. *Estate of Nerae*, 111.

See PROBATE COURTS; WILLS, 5.

EXEMPTIONS.

See EXECUTIONS.

FACTORS.

See PLEDGE, 2.

FIXTURES.

FIXTURES — BREACH OF BOND TO RETURN. — The fixtures in a mill erected upon land on which were two mortgages were sold under execution by the junior mortgagee, and by him purchased and removed from the mill. He then rented the fixtures to a third party who, with his consent, placed them back in the mill for use, giving his bond for their return. *Held*, that they thereby became subject to the senior mortgage, and by a foreclosure thereof and a sale thereunder of the real estate, the fixtures passed to the purchaser, and the right of the purchaser under the junior mortgage thereby becoming extinct, the party hiring the fixtures from him is excused from returning them, and cannot be held liable in an action on his bond therefor. *Daniels v. Bovee*, 000.

FORGERY.

See CRIMINAL LAW.

FRAUD.

1. **CONCEALMENT MEANS, IN EQUITY, CONCEALMENT OF THOSE MATERIAL FACTS AND CIRCUMSTANCES** which one party to the contract is under a legal or equitable obligation to make known to the other, and which the latter, of right and by law, is entitled to have communicated to him. *Pickering v. Day*, 291.
2. **CREDITOR IS ENTITLED TO RELIEF ON AVERRING AND PROVING THAT HIS DEBTOR**, in anticipation of a judgment against him, fraudulently conveyed his property to another who was privy to the fraud, with the intent to hinder and delay the creditor, who thereafter obtained judgment and levied his execution on the property in the hands of the fraudulent grantee, but was afterwards induced to release the levy on the false and fraudulent representations of the grantor, and to permit his

judgment to become barred by the statute of limitations by reason of similar false representations by the judgment debtor, to the effect that he had no property, and was insolvent; and that he discovered the fraud but recently before the commencement of the action. *Marshall v. Buchanan*, 95.

3. **LAW AFFORDS NO IMMUNITY TO FRAUDULENT DEBTOR**, who, by his deceitful practices, induces his creditor to forbear his efforts to collect his debt until after it has become barred by lapse of time. *Id.*
4. **TO CONSTITUTE TRANSACTION FRAUDULENT**, there must be a willful misrepresentation of facts, or the suppression of such facts as honesty and good faith require to be disclosed. *Mitchell v. Deeds*, 621.
5. **REPRESENTATIONS MADE BY OFFICERS OF CORPORATION**, to one dealing with it, that the corporation is a legally organized body, when in fact it was irregularly organized, will not render the transaction void for fraud and misrepresentation, where it appears that articles of incorporation had actually been drawn up and signed, and officers of the organization elected, and that the officers making the representations did not know that the corporation was illegal and unauthorized. *Id.*
6. **BURDEN OF PROVING FRAUD AND FRAUDULENT REPRESENTATIONS** is upon the party setting them up. *Id.*

See FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCES.

1. **ACTION LIES FOR FALSE AND FRAUDULENT REPRESENTATION**, whereby another has sustained damage. *Marshall v. Buchanan*, 95.
2. **CONVEYANCE BY INSOLVENT, WHEN CONSTRUCTIVELY FRAUDULENT AGAINST CREDITORS**. — Conveyance by insolvent of all his property, or substantially all, in consideration of love and affection only, is constructively fraudulent against subsequent as well as existing creditors. *Redfield v. Buck*, 241.
3. **ADJUDICATION THAT CONVEYANCE OF REAL ESTATE IS FRAUDULENT**, as against certain creditors of the grantor, affects the title of the grantee only so far as such creditors are concerned who were parties to the proceeding in which the adjudication was had. Other creditors, not parties, cannot avail themselves of the adjudication. *Huntington v. Jewett*, 788.
4. **WHETHER VOLUNTARY CONVEYANCE TO CHILD WILL BE FRAUDULENT** and void as to creditors of the father, in the absence of actual intent to defraud, will depend upon its reasonableness, and the condition of the grantor as to his ability to pay his debts out of other property retained by him. *Stewart v. Rogers*, 000.
5. **STATE OF FACTS HELD SUFFICIENT TO RENDER VOLUNTARY CONVEYANCE TO CHILD VOID** as to existing creditors of the father. *Id.*

GARNISHMENT.

See ATTACHMENT.

GUARDIAN AND WARD.

1. **LETTERS OF GUARDIANSHIP ARE**, BY COMMON LAW, LOCAL to the jurisdiction in which they are granted; and a foreign guardian cannot, by virtue of his letters granted by the proper court in another state, where he and his ward are domiciled, claim as a legal right to recover money belonging to the ward in the hands of a guardian of the estate of such ward.

resident in the state of Indiana. But the court of common pleas in the latter state, possessing general chancery jurisdiction in such cases, and having jurisdiction over the resident guardian, and the funds in his hands belonging to the ward, has power to order that such funds be transmitted or paid over to the guardian in such other state where the ward is domiciled. *Earl v. Dresser*, 660.

2. PROVISION AUTHORIZING COURT HAVING JURISDICTION TO ORDER DELIVERY OF PROPERTY TO NON-RESIDENT GUARDIANS of non-resident wards as to the court may seem just and right, contained in the Indiana act of 1843, was but declaratory of the law before its enactment, courts of equity having possessed the same power under the common law. The question whether or not such an order should be made is addressed to the sound discretion of the court, to be determined upon principles of comity, equity, and justice; and where it appears for the best interest of the ward, and that no principle of public policy will be violated, or the rights of any of our citizens be injured or impaired, the court should make the order. *Id.*
3. FATHER IS NATURAL GUARDIAN, and unless morally or otherwise incapacitated, has the right to the custody, care, and education of his infant child. *Id.*

HIGHWAYS.

See CORPORATIONS, 37, 39; DAMAGES, 4.

HOMESTEADS.

See REGISTRATION.

HOMICIDE.

See CRIMINAL LAW.

HUSBAND AND WIFE.

1. IF ESTATE IN FEE BE GRANTED TO HUSBAND AND WIFE, THEY ARE NEITHER JOINT TENANTS nor tenants in common, but both are seized of the entirety, and the whole goes to the survivor. The Illinois statute of wills does not change this common-law principle. *Lutz v. Hoff*, 502.
2. RESULTING TRUST — MONEY FURNISHED BY WIFE. — Lands were bought with the wife's money, and the conveyance was to the husband and wife by name, and their heirs and assigns forever. There was no evidence of intention on the part of the wife to create a trust. *Held*, that the law would infer that she conferred an interest on her husband, as expressed in the deed, and that no trust would arise by operation of law in favor of herself or her heirs. *Id.*
3. HUSBAND IS LIABLE FOR DEBTS OF WIFE CONTRACTED BEFORE MARRIAGE, notwithstanding the fact that the marriage took place after the act of 1861, which was passed to protect the separate property of married women. *Connor v. Berry*, 417.

See MARRIED WOMEN; MECHANICS' LIENS, 5; REGISTRATION.

IMPRISONMENT.

1. CREDITOR MAY SUE HIS DEBTOR, WHO IS IMPRISONED IN STATE PRISON for a term less than his natural life, and may subject the property of such debtor to the satisfaction of his debt during the term of his imprisonment. *Estate of Nerac*, 111.

2. **FORFEITURES AND DISABILITIES IMPOSED BY COMMON LAW** upon persons attainted of felony are unknown to the laws of California; and a conviction of felony is followed by no consequences except such as are declared by statute. *Id.*
3. **ONE IS NOT DEAD IN LAW** who is sentenced for a felony to the state prison for a term less than his natural life. Though his civil rights are in some matters suspended, the rights of his creditors are not suspended. *Id.*

INFANCY.

See JURISDICTION, 10-12; MECHANICS' LIENS.

INJUNCTIONS.

1. **UNDER CALIFORNIA PRACTICE, PLAINTIFF IS ENTITLED TO INJUNCTION** at the time of issuing the summons upon the complaint alone, if it makes a proper case, and is duly verified as prescribed, but if he asks for an injunction thereafter, he must do so upon affidavit. *Falkinburg v. Lucy*, 76.
2. **DISSOLUTION OF INJUNCTION.** — If an injunction has been granted without notice to the defendant, he may move to dissolve: 1. Upon the papers, whatever they may have been, upon which it was granted; or 2. Upon such papers, and affidavits on the part of the defendants, with or without the answer. If the defendant pursues the first course, the plaintiff can make no further showing, but must stand upon his complaint, or his complaint and affidavits, as the case may be; but if the defendant pursues the second course, the plaintiff may meet it with a further showing on his part. *Id.*
3. **MOTION TO DISSOLVE INJUNCTION ON VERIFIED ANSWER.** — If the defendant moves to dissolve an injunction upon what he has prepared as his verified answer, he makes it an affidavit in the sense of the statute for all the purposes of his motion, and he cannot deprive the plaintiff of his right to reply by way of affidavits on his part. *Id.*

INSOLVENCY.

DEBTOR'S DISCHARGE UNDER INSOLVENT LAW OF ONE STATE CANNOT OPERATE TO DISCHARGE HIM FROM CLAIM OF CREDITOR WHO IS CITIZEN OF ANOTHER STATE, notwithstanding the fact that the debt was contracted in the state where the discharge was granted; or that the creditor had obtained judgment on the debt in that state. *Easterly v. Goodwin*, 237.

See FRAUDULENT CONVEYANCES, 2.

INSURANCE.

1. **INSURERS OF SAFE CARRIAGE OF STOCK ARE LIABLE FOR ACCIDENT** to the stock while being transhipped from cars to a boat, under a policy which covered, with the usual exceptions, the perils of railway and river, and by special indorsement fixed the places of shipment and destination, and the route to be taken. *Aetna Ins. Co. v. Stivers*, 467.
2. **RISK ASSUMED BY INSURANCE COMPANY IN INSURING HORSES** described with other insured property as situated in "section 22, town 99, range 7 west," which was the farm of the assured, is not necessarily limited to the use of the horses on section 22, if there is no express provision in the policy so limiting their use, but extends to the ordinary and beneficial use of them, whether on the farm, or temporarily absent therefrom; and

the company is liable where the assured, while hauling his grain to market, stopped over night at a hotel and put his horses in the hotel barn, and the barn together with one of the horses was destroyed by fire during the night, notwithstanding the company had not consented to the use of the team off from section 22, the policy containing the usual condition against increasing the risk without the company's consent. *Peterson v. Mississippi F. I. Co.*, 748.

3. **STIPULATION IN INSURANCE POLICY THAT SALTPETER SHALL NOT BE KEPT ON PREMISES** is violated and the policy avoided if the assured kept saltpeter in a keg on sale as an article of merchandise. *Commercial Ins. Co. v. Mahman*, 543.
4. **ERECTION OF ADDITIONAL BUILDING ON INSURED PREMISES WILL NOT AVOID POLICY** which contains the condition that "any change within the control of the assured, material to the risk, without permission herein, shall avoid this policy," and further provides that it shall be optional with the company to terminate the policy if the risk be increased by the erection of buildings. The "change" alluded to refers to change in police regulations made to prevent accidents from fire. *Id.*
5. **INSTRUCTION IN ACTION ON INSURANCE POLICY THAT IF COMPANY KNEW CHARACTER OF BUSINESS** to be carried on, when it issued the policy, it must be held to have taken the risks usual in that business, is erroneous as tending to mislead, where the defense was that the assured kept saltpeter on the premises in violation of the conditions of the policy, and the proof showed not only that it was of doubtful necessity for the assured to keep any saltpeter on the premises to carry on his business, and unreasonable to keep a keg of it, but also that he kept it on sale. *Id.*

INTEREST.

1. **DAMAGES FOR BREACH OF WARRANTY OF TITLE OF LAND** includes purchase-money paid, with six per cent interest thereon for five years before the eviction, and afterwards to the time of the recovery on the covenant, if the plaintiff is liable for mesne profits; for the possession and profits of the land are presumed to be equal to the interest on the purchase-money, and as the grantee is liable for mesne profits only for five years before the eviction, his recovery of interest will be limited to that period. *Wood v. Kingston Coal Co.*, 554.
2. **STATUTE OF LIMITATIONS NEED NOT BE PLEADED IN ORDER TO RESTRICT RECOVERY OF INTEREST** by grantee suing for breach of warranty of title to a period commencing five years before the eviction, as the question is merely of the measure of damages, not of the limitation of the action. *Id.*
3. **EXCESS OF INTEREST CANNOT BE REMITTED IN APPELLATE COURT**; for that court cannot alter or amend the records of inferior courts. *Id.*

See ATTACHMENTS, 5.

INTERPLEADER.

1. **BILL OF INTERPLEADER MAY BE FILED** where two or more claim the same thing from complainant by different or separate interests, and he, not knowing to which of the claimants he ought of right to render the thing in dispute, fears that he may suffer injury from their conflicting claims, and therefore prays that they may be compelled to interplead, and state their claim, so that it may be adjudged to whom the claim belongs. *Tyus v. Rust*, 365.

2. **INTERPLEADER.** — WHERE WAREHOUSEMAN, AS AGENT, sells the property of his bailor stored with him to a purchaser who leaves the property in the warehouse, he is not entitled to file a bill of interpleader to prevent suits brought against him by the original bailor, who denies the agency and the purchaser, both of whom claim title to the property. *Id.*
3. **PARTY CANNOT FILE BILL OF INTERPLEADER** who is obliged to put his case upon the ground that, as to some of the defendants, he is a wrong-doer. *Id.*
4. **BILL OF INTERPLEADER MUST CONTAIN AFFIDAVIT** of complainant that there is no collusion between him and any of the defendants. *Id.*

JOINT LIABILITY.

JURY IS WARRANTED IN FINDING TWO DEFENDANTS JOINTLY LIABLE for the price of a pump purchased by one of them, where the evidence showed that they were jointly engaged in farming and stock-raising, that they were in the habit of purchasing goods and other property for the farm, which was charged to them jointly, and paid for sometimes by one and sometimes by the other, and that the pump was purchased for the use of their joint stock and for their mutual benefit, notwithstanding it was placed on the separate land of the party purchasing it. *Fortin v. United States W. El. & P. Co.*, 560.

JUDGMENTS.

1. **JUDGMENT IS GENERAL LIEN UPON REAL ESTATE, WHICH COURT OF LAW CANNOT CONTROL** by directing execution of the judgment against specific portions of the property of the defendant in execution, to the exclusion of other portions equally subject to the general lien, on account of equities claimed to exist in favor of a person not a party to the judgment or execution. The only remedy is in a court of equity, where all interests may be heard, and all rights adjusted. *Clouts v. Ritch*, 345.
2. **LIEN OF JUDGMENT ATTACHES, NOT TO NAKED LEGAL TITLE**, but to the judgment debtor's actual interest in the land; and if he has nothing but the naked legal title, no lien attaches. *Thomas v. Kennedy*, 740.
3. **JUDGMENT FOR POSSESSION OF LAND, AND PROCEEDINGS UNDER IT PUTTING PLAINTIFF IN POSSESSION, ARE RELEVANT** on the question of the plaintiff's possession, and admissible in a subsequent action by him to recover possession of the same land against another person who entered upon the land after such judgment was recovered. *Moon v. Rollins*, 181.
4. **PERSON MAY RECEIVE MONEY DUE ON JUDGMENT RENDERED IN FAVOR OF HIMSELF** and several others, co-plaintiffs, but he cannot, without authority from his co-plaintiffs, set off a judgment due to him and them jointly against another judgment held by the defendant in such joint judgment against him alone. *Corwin v. Ward*, 93.
5. **MONEY PAID IN SATISFACTION OF JUDGMENT, UPON COMPROMISE AND SETTLEMENT THEREOF, and of the subject of litigation, cannot be recovered back** upon the reversal of the judgment by the supreme court. *Kaufman Dickensheets*, 694.
6. **CERTIFIED COPY OF TRANSCRIPT FROM DOCKET OF JUSTICE OF PEACE** is properly admitted in evidence in an action on a foreign judgment rendered on appeal from the justice's court, where the transcript is embraced in the certified copy of the record of the court wherein the judgment sued upon was rendered and forms a part of its entire record. *Olemmer v. Cooper*, 720.

7. **RECORD OF FOREIGN JUDGMENT WHICH IS PROVED TO BE ENTITLED TO FAITH AND CREDIT OF JUDGMENT**, by the law, practice, and usage of the state from whence the record came, must be given the same force and effect in an action on the judgment in a sister state; and on appeal it will be presumed that such proof was made in the court below where there is nothing to show that the record contains all the evidence introduced at the trial. *Id.*
- See **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 4; **ATTORNEY AND CLIENT**, 8, 9; **JUDICIAL SALES**; **PROBATE COURTS**, 1.

JUDICIAL SALES.

1. **PROVISION OF INDIANA STATUTE REQUIRING THAT IN SALES OF LAND BY SHERIFF**, "if the estate shall consist of several lots, tracts, and parcels, each shall be offered separately, and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same is not susceptible of division," applies to sales on foreclosure of mortgages as well as to sales on execution. *Piel v. Brayer*, 699.
2. **SALE OF SEVERAL DISTINCT TRACTS OR PARCELS OF LAND IN ONE BODY**, made by the sheriff in violation of the statute, is void. *Id.*
3. **JUDGMENT CREDITOR PURCHASING AT SHERIFF'S SALE IS CHARGEABLE WITH NOTICE** of all irregularities in the sale, and a purchaser from him is chargeable with notice of the contents of the record. *Id.*
4. **PRESUMPTION THAT SHERIFF DID HIS DUTY IN MAKING SALE DOES NOT PREVAIL**, where it is apparent from the face of the record that the sale was made in violation of the statute. *Id.*
5. **WHERE WHOLE OF MORTGAGE DEBT IS DUE, IF LAND CONSIST OF SEPARATE PARCELS**, it is the imperative duty of the sheriff to offer them separately, though the decree of foreclosure direct otherwise, and if it consist of a single tract susceptible of division without injury, and the sale of the whole is not necessary, he is required to divide it and offer at one time only so much of it as may be necessary to satisfy the judgment, interest, and costs. *Id.*

JURISDICTION.

1. **JURISDICTION CONFERRED UPON FEDERAL COURTS IN CIVIL CAUSES OF ADMIRALTY AND MARITIME JURISDICTION** by the ninth section of the judiciary act of 1789 is exclusive. *Walters v. Steamboat Mollie Dosier*, 722.
2. **IOWA STATUTE, SO FAR AS IT UNDERTAKES TO GIVE REMEDY IN REM AGAINST BOAT OR VESSEL** for a cause of action of admiralty cognizance, is in conflict with the judiciary act of Congress of 1789 conferring exclusive admiralty jurisdiction upon the United States district courts. *Id.*
3. **TO DETERMINE QUESTION OF ADMIRALTY JURISDICTION IN REM**, regard must be had to the character of the waters, of the boat or vessel, and of the contract or tort which forms the subject of the action. *Id.*
4. **ADMIRALTY JURISDICTION UNDER NINTH SECTION OF JUDICIARY ACT OF 1789** extends to the public navigable rivers of the United States, and to all public waters capable of being navigated by maritime or commercial vessels propelled by wind or steam. *Id.*
5. **ADMIRALTY TAKES COGNIZANCE OF MARITIME TORTS**. *Id.*
6. **SUIT AGAINST BOAT BY NAME, AND SEIZURE OF IT, IS NOT COMMON-LAW REMEDY**, and therefore not one of the remedies saved to suitors by the ninth section of the judiciary act of 1789. *Id.*

7. COLLISION BETWEEN STEAMBOAT AND FLAT-BOAT ON NAVIGABLE RIVER is of admiralty cognizance, where the remedy pursued is *in rem* against the boat by name, and not against its owners. *Id.*
8. WHERE STEAMBOAT NAVIGATING MISSOURI RIVER AS COMMON CARRIER of passengers and freight tortiously ran so near a flat-boat loaded with lumber and navigating the river as to cause it to sink, a suit *in rem* against the steamboat was of admiralty cognizance, and the Iowa statute could not give the state courts jurisdiction. *Id.*
9. OBJECTION TO JURISDICTION OF STATE COURT, IN CASE OF ADMIRALTY COGNIZANCE, may be raised for the first time in the appellate court. *Id.*
10. MODE PROVIDED BY STATUTE MUST BE PURSUED, WHEREBY COURT ACQUIRES JURISDICTION over the persons of the minor heirs, in proceedings by an administrator to sell the real estate of his intestate; otherwise the court is without jurisdiction of the persons of such heirs, and, as against them, the proceedings are void. A guardian has no power, in such case, to admit service of the summons for the minor heirs. *Clark v. Thompson*, 457.
11. PRESUMPTION IN FAVOR OF JURISDICTION OVER PERSON, even of a court of general jurisdiction, may be rebutted in all collateral proceedings. And such presumption is rebutted when the record shows service which is insufficient, and there is no finding of the court from which it may be inferred that there was other service or appearance. *Id.*
12. WHERE COURT DOES NOT ACQUIRE JURISDICTION OF PERSONS OF MINOR HEIRS IN MODE PROVIDED BY STATUTE, in a proceeding to sell the real estate of a decedent by his administrator, such jurisdiction is not conferred by the appointment of a guardian *ad litem*, and his answer for the heirs; and, as to them, a decree in such case is a nullity, and may be attacked in a collateral proceeding. *Id.*

See EQUITY; PROBATE COURTS.

LANDLORD AND TENANT.

1. LEASE, WHEN VOIDABLE, AND HOW AVOIDED — LIMITATION AS TO WAIVER OF DEMAND AND RE-ENTRY. — Where a lease contains the following clauses: "If said rent shall remain unpaid after the same shall become payable, the lease shall thereupon expire and terminate, and the lessor may, at any time thereafter, re-enter the premises and the same possess as of his former estate; and without such re-entry may recover possession in the manner provided by the statute relating to summary process; it being understood that no demand for the rent and re-entry for condition broken as at common law shall be necessary to enable the lessor to recover possession under said statute, but that all right to any such demand or re-entry is expressly waived by the lessee," — it is voidable at the election of the lessor upon the non-payment of rent when due and properly demanded; but though the lessor need not make a formal re-entry to avoid the lease, he must do some unequivocal act that will signify to the lessee his election to terminate the lease; and the waiver of a demand and re-entry is limited to such demand and re-entry as are necessary for a recovery of the premises under the statute relating to summary process, and has no application to an action of ejectment. *Read v. Tuttle*, 216.
2. ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE. — Where A, being in possession of land, delivers the possession to B, upon his request, and

- upon his promise to return it, with or without rent, at a specified time, or at the will of A, B cannot be allowed, while still retaining the possession, to dispute A's title; but the rule is otherwise if B is in possession and takes a lease from A, since the latter parts with nothing, and the former has obtained nothing by the transaction. *Franklin v. Merida*, 129.
3. DOCTRINE OF ESTOPPEL, AS BETWEEN LANDLORD AND TENANT, IS DESIGNED as a shield for the protection of the former, and not as a sword for the destruction of the latter. *Id.*
 4. BARE POSSESSION BY TENANT OF DEMISED LAND AT TIME LEASE IS GIVEN is sufficient to take the case out of the operation of the general rule, that the tenant cannot, before surrendering possession, dispute the landlord's title; and there need not be, in addition to the possession of the tenant, any force, fraud, misrepresentation, or mistake induced by the landlord, beyond what is implied in the transaction itself, by which the tenant was induced to take the lease. *Id.*
 5. TENANT'S GENERAL COVENANT TO REPAIR DEMISED PREMISES BINDS HIM under all circumstances, even though the injury proceeds from the act of God, from the elements, or from the act of a stranger; and if he desires to relieve himself from liability for injuries resulting from any cause whatever, he must except them from the operation of his covenant. *Po-lack v. Pioche*, 115.
 6. INJURY TO DEMISED PREMISES BY WATER IS NOT ACT OF GOD OR OF ELEMENTS, where the embankment of a natural reservoir, which is filled with water by unusual rains, is broken by a stranger, and the injury thus results; and the tenant is bound to repair, even if "damages by the elements or acts of Providence" are excepted from his covenants. *Id.*

See EJECTMENT, 3-7.

LIBEL.

1. DOMESTIC CORPORATION MAY MAINTAIN ACTION FOR LIBEL; but *quære*, whether the comity by which a foreign corporation is permitted to bring suit upon its contracts should be so far extended as to permit a suit for libel. *Hahnemannian L. I. Co. v. Beebe*, 519.
2. IT IS AGAINST PUBLIC POLICY TO TREAT AS LIBELOUS UPON INSURANCE CORPORATION an article which merely assumes that the corporation proposes to do for its own advantage, or that of its stockholders, whatever its charter may expressly authorize it to do. A free criticism of the charter of an insurance company, or of any other corporation which claims the confidence of the public, and seeks the possession of its funds, is to be encouraged rather than repressed, as a means of public security. *Id.*
3. WHERE INSURANCE COMPANY HAS PROCURED CHARTER WHICH AUTHORIZES it to pay an interest of thirty per cent per annum to its stockholders before laying by a fund for the security of its policy-holders, a publication is not libelous merely because it assumes that the company will do, for the profit of its stockholders, that which it has obtained an express power to do; and because it argues that a company, organized under such a charter, must necessarily be unworthy of public confidence. *Id.*
4. PUBLICATION MAY BE LIBELOUS UPON CORPORATION IF ITS CHARTER CONTAINS NO AUTHORITY to do what is made the subject of criticism, and the company does not propose to do its business in that manner. *Id.*

5. **FOREIGN CORPORATION SUING FOR LIBEL SHOULD SET OUT ITS CHARTER AT LENGTH** in the declaration, so that the court may determine whether the alleged libelous publication was false in stating the mode in which it authorized the business of the company to be done; and an omission to do so is fatal. Nor can the charter be treated as properly pleaded when brought before the court only as a part of the alleged libelous publication. *Id.*
6. **NECESSITY OF SETTING OUT CHARTER IN FULL IN DECLARATION** by foreign corporation in an action for libel is not obviated by the use of the usual formula, that the defendant falsely and maliciously wrote, published, etc. This is sufficient in an action by a natural person for words actionable in themselves, because the law presumes such person to be of good credit and character until the contrary is shown; but the court cannot presume that the legislature of a foreign state has not granted an unwise charter and authorized the company to do the thing which the publication charges it with proposing to do. *Id.*

See PLEADING AND PRACTICE, 9, 10.

LIENS.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4, 6, 7; ATTORNEY AND CLIENT, 8-10; JUDGMENTS, 1, 2; MECHANICS' LIENS; PARTNERSHIP, 1.

LIS PENDENS.

DOCTRINE OF LIS PENDENS DOES NOT APPLY TO NEGOTIABLE PAPER. *Mims v. West*, 379.

MALICIOUS PROSECUTION.

EVIDENCE ADMISSIBLE FOR DEFENDANT IN ACTION FOR MALICIOUS PROSECUTION, AND WHICH MAY PROPERLY BE SUBMITTED TO JURY. — Where the defendant had made a complaint against the plaintiff before a justice of the peace, alleging that he had threatened him with personal violence, and that he was in fear of him, and praying that he be required to give sureties of the peace, and the plaintiff was acquitted by the justice, and brought an action against the defendant for a malicious prosecution, — it was held in the latter case that the defendant might show, 1. The quarrelsome character of the plaintiff, to warrant the belief that he had reason to fear that he would commit the violence threatened; 2. That the acquittal of the plaintiff was caused by the exclusion of legal evidence offered by the defendant; 3. That the jury might properly be instructed that upon the question of probable cause, they were to consider the fact of the exclusion of this evidence in connection with the fact of the acquittal. *Sherwood v. Reed*, 284.

MANDAMUS.

1. **MANDAMUS IS NOT WRIT OF RIGHT, BUT PREROGATIVE WRIT**, which may properly issue upon a proper case previously shown to the satisfaction of the court. *State v. Kirke*, 314.
2. **GRANTING OF WRIT OF MANDAMUS IS MATTER TO BE EXERCISED WITH SOUND DISCRETION**, and it may be refused when proper to do so. *Id.*
3. **MANDAMUS SHOULD NOT BE DENIED WHERE THERE IS RIGHT**, and the law has established no specific remedy. It should issue to prevent a failure of justice. *Id.*

4. **MANDAMUS CANNOT BE USED TO CONTROL DISCRETION OR CONCLUSIONS OF FACT**, as a general rule; but some cases are here given where jurisdiction by *mandamus* has been exercised to control discretion. *Id.*
5. **MANDAMUS MAY BE USED TO CONTROL DISCRETION OF INFERIOR COURT** in striking an attorney's name from its rolls where that discretion was exercised with manifest injustice. *Id.*
6. **CASES SHOWING HOW MANDAMUS HAS BEEN USED AS WRIT OF RESTITUTION.** *Id.*
7. **MANDAMUS IS APPROPRIATE REMEDY TO RESTORE ATTORNEY TO PRACTICE** IN INFERIOR COURT, especially where no appeal or writ of error from the order of the inferior court is authorized by law. *Id.*
8. **MANDAMUS WILL LIE TO COMPEL PROPER OFFICER OF CORPORATION TO MAKE NECESSARY TRANSFER OF STOCK** on its books to one who had purchased the same at sheriff's sale. *Bailey v. Strohecker*, 88.

See CORPORATIONS, 27.

MARRIED WOMEN.

1. **EXECUTORY CONTRACTS OF MARRIED WOMEN.** — The common-law rule that the wife, during coverture, is incapable of entering into an executory contract is not changed by statute in Indiana. *Stevens v. Parish*, 636.
2. **AN EXECUTORY CONTRACT BY WIFE ALONE OR JOINTLY WITH HER HUSBAND**, for the sale of the wife's lands, is not binding on her, nor is it in the power of the court, or the husband, to compel the wife to join her husband in a deed conveying her lands. *Id.*
3. **HUSBAND CANNOT BE COMPELLED TO JOIN WIFE IN CONVEYANCE OF HER SEPARATE PROPERTY**; the authority given him by statute to do so is purely discretionary, the exercise of which must depend entirely upon his own will. *Id.*
4. **WIFE MAY MAINTAIN ACTION DURING COVERTURE AGAINST HUSBAND**, in California, to recover money due upon a promissory note executed by the husband to the wife before marriage, and which is the separate property of the wife. The statute giving the husband the management and control of the separate property of the wife during marriage does not affect the right of the wife to bring such action. *Wilson v. Wilson*, 194.
5. **IF HUSBAND MANAGES SEPARATE PROPERTY OF WIFE**, he must manage it as her separate property; and she is entitled to enjoy the income, or the property itself, as separate property. *Id.*
6. **LIMITATION AS TO KIND OF ACTIONS THAT MAY BE MAINTAINED BY WIFE**, when they concern her separate property, or are against her husband, does not exist in California. *Id.*
7. **UNDER IOWA ACT OF 1861, MARRIED WOMAN CANNOT CONVEY HER REAL ESTATE** unless her husband joins in the deed. *Scovil v. Kelsey*, 415.

See EQUITY, 9; STATUTE OF LIMITATIONS, 4.

MECHANICS' LIENS.

1. **CONTRACT MADE WITH MINOR TO FURNISH LABOR AND MATERIALS** for the improvement of his property is not binding upon him, and the contractor can claim no lien therefor against the property. *McCarty v. Carter*, 572.
2. **WHERE MINOR CONTRACTS FOR MATERIALS AND LABOR** for the improvement of his property, his receipt of the rents from the property so improved, after he becomes of age, will not amount to a ratification of the contract, so as to give to the contractor a lien upon the property. *Id.*

3. **MECHANICS AND MATERIAL-MEN ARE BOUND TO ASCERTAIN** whether the party with whom the contract is made is a minor or person otherwise incapacitated, for if the contract is with such a person it is not binding, and the lien of the contractor will fail. *Id.*
4. **PERSON HOLDING LESS ESTATE IN REALTY THAN FEE** is nevertheless considered an owner under the Illinois mechanic's lien law, but only to the extent of his interest or estate, and he cannot, by his contract, create a lien against the property to any greater extent than his estate or interest. *Id.*
5. **ESTATE OF HUSBAND ACQUIRED BY MARRIAGE** may, by his contract, be subjected to the lien of a mechanic or material-man under the Illinois statute. *Id.*
6. **CONTRACT FOR ERECTION OF BUILDING UPON PREMISES** by one who is not owner thereof, and who is unauthorized to so contract, is not ratified so as to allow a claim of lien against the premises, by mechanics and material-men, by the fact that the owner, after the completion of the house, received the rents and profits therefrom. *Id.*

See ATTORNEY AND CLIENT, 10.

MISTAKE.

See EQUITY, 10; ESTOPPEL, 1; SPECIFIC PERFORMANCE, 2.

MORTGAGES.

1. **MORTGAGE GIVEN IN GOOD FAITH FOR GREATER SUM THAN IS DUE BY MORTGAGOR TO MORTGAGEE**, to secure both a present indebtedness and future advances, is not fraudulent as to the creditors of the mortgagor because given for a greater sum than is due, although the mortgage does not express upon its face that the excess is for future advances. *Tully v. Harloe*, 102.
2. **MORTGAGE GIVEN IN GOOD FAITH TO SECURE FUTURE ADVANCES** is a good and valid security; and such mortgage need not express its object upon its face, though it would be better if it did. *Id.*
3. **MORTGAGE KNOWINGLY GIVEN FOR LARGER AMOUNT THAN IS DUE**, and not as security for future advances, is fraudulent in law as to the creditors of the mortgagor. *Id.*
4. **MORTGAGE IS LIABLE TO SUSPICION**, and ought to be critically examined, when it misrepresents the transaction between the mortgagor and mortgagee. *Id.*
5. **IT IS QUESTION OF FACT FOR JURY**, under proper instructions from the court, whether a mortgage given for a greater sum than is due was given in good faith, both for a present indebtedness and to secure future advances. *Tully v. Harloe*, 102.
6. **PURCHASER UNDER DECREE IN SUIT TO FORECLOSE MORTGAGE** acquires only such title as the mortgagor had at the time of the mortgage; and third persons, not made parties to the suit, and claiming an interest in the property included in the mortgage, are not affected by the decree, and may afterwards assert their rights in such property. *Racine & M. R. R. Co. v. Farmers' L. & T. Co.*, 593.

See CORPORATIONS, 19, 20; SPECIFIC PERFORMANCE, 2.

MURDER.

See CRIMINAL LAW.

NAMES.

See CONTRACTS, 1; NEGOTIABLE INSTRUMENTS.

NAVIGABLE RIVERS.

See JURISDICTION; PRESCRIPTION; RIPARIAN RIGHTS; WATERCOURSES.

NEGLIGENCE.

1. ONE WHO IS INJURED THROUGH NEGLIGENCE OF ANOTHER WHILE BOTH ARE VOLUNTARILY ENGAGED IN SAME UNLAWFUL TRANSACTION will not be afforded any relief by the law. *Wallace v. Cannon*, 385.
2. ONE OFFENDER AGAINST LAW CANNOT SET UP AS DEFENSE THAT PLAINTIFF WAS ALSO OFFENDER, unless the parties were engaged in the same illegal transaction. It is only in such a case that the maxim, *In pari delicto potior est conditio defendentis et possidentis*, applies. *Id.*
3. RULE THAT ALL PERSONS ARE REQUIRED TO SO USE THEIR OWN as to prevent injuries to others applies to the same extent to railroad companies as it does to private individuals. *Ohio & C. R. R. Co. v. Shanefelt*, 504.
4. IT IS NOT NEGLIGENCE PER SE FOR RAILROAD COMPANY TO PERMIT dry weeds and grass to accumulate on its right of way, but such an accumulation may be evidence from which negligence may be inferred. *Id.*
5. OWNER OF LAND CONTIGUOUS TO RAILROAD IS EQUALLY CHARGEABLE with the company for want of care in respect to the dry grass on his own land; and he cannot recover for injuries by fire thus arising, unless it appears that the negligence of the company was greater than his own. *Id.*
6. CHILD IS NOT TRESPASSER, AND HIS PARENTS ARE NOT GUILTY OF NEGLIGENCE, where it appeared that the child, who was four years old and was living with his parents in close proximity to the defendants' railway track, was left by his mother, who had occasion to visit a neighbor, with his sister, a girl fourteen years of age, and while she was engaged in some necessary duty the boy left the house, and while he was within the defendants' right of way, but upon a private road which crossed the track and was used by the public, the accident happened; and that it was caused by a train colliding with a push-car, and shattering the car to pieces, a fragment of which struck the boy, who was at some considerable distance from the place of collision, and caused the injuries complained of; for the boy, in common with the rest of the public, had a right to be on the private road and within the defendants' right of way, until its use by the public should be prohibited by the company. *Pittsburgh, F. W., & C. R'y Co. v. Bumstead*, 539.
7. MOTHER WHO LEAVES CHILD FOUR YEARS OF AGE WITH HIS SISTER fourteen years of age, who is shown to be intelligent and affectionate, while the mother visits a neighbor, is not guilty of contributory negligence, in an action against a railroad company for injuries to the child. *Id.*
8. RAILROAD COMPANY IS LIABLE FOR NEGLIGENCE OF AGENT IN LOANING PUSH-CAR to persons unaccustomed to its use, who left it upon the track, whereby a collision occurred. *Id.*
9. NEGLIGENCE OF ENGINEER IS NEGLIGENCE OF RAILROAD COMPANY, where he might have stopped the train and avoided a collision with a push-car, but did not do so though warned by signals of persons, and though the push-car was in sight for more than a mile; and it is no excuse that he supposed the car to be in the charge of section-men who would remove it from the track upon the approach of the train, for he should have known

that the car was not under the control of railroad employees, by the fact that they did not attempt to remove it on the signal being given. *Id.*

10. **INJURIES TOO REMOTE TO CONSTITUTE CAUSE OF ACTION.** — Where one is injured by the wrongful act of another, and others are indirectly and consequentially injured, but not by reason of any natural or legal relation, the injuries of the latter are too remote to constitute a cause of action. *Gregory v. Brooks*, 278.
11. **INDIRECT AND CONSEQUENTIAL INJURIES ARE ACTIONABLE WHEN.** — Where one is injured by the wrongful act of another, and others are indirectly and consequentially injured, the injuries of the latter are actionable, though not directly committed upon the plaintiff in the case, if they were maliciously and fraudulently intended to affect, and did injuriously affect, him in his contract or business relations. *Id.*
12. **DECLARATION SETS FORTH GOOD CAUSE OF ACTION FOR INDIRECT AND CONSEQUENTIAL INJURY** where it alleges that the defendant falsely and fraudulently represented himself to be a superintendent of wharves, and as such ordered the captain of a vessel which was discharging at the plaintiff's wharf to remove therefrom, by which the plaintiff lost the profit that he was to have received for the use of his wharf, and which he would otherwise have received; and that said acts of the defendant were maliciously and fraudulently done with intent to injure the plaintiff and defraud him of his just profit from the use of the wharf. *Id.*
13. **INJURY DONE TO ONE WITH MALICIOUS OR FRAUDULENT DESIGN TO INJURE ANOTHER THROUGH CONTRACT RELATION—GIST OF ACTION FOR, AND EVIDENCE THEREIN.** — The pivotal fact in an action against a wharf superintendent for wrongfully ordering the captain of a vessel discharging at plaintiff's wharf to remove therefrom, whereby the plaintiff was injured and deprived of his wharfage, is the existence of a malicious and fraudulent design to injure the plaintiff and to deprive him of his wharfage. If that existed, the action lies, and the plaintiff is entitled to recover. If that did not exist, the injury to the plaintiff is remote, and he cannot recover. It is essential that the declaration should contain allegations averring such a design, and such allegations must be proved as laid. *Id.*
14. **INSTRUCTIONS WERE HELD ERRONEOUS IN ACTION AGAINST WHARF SUPERINTENDENT** for wrongfully ordering the captain of a vessel discharging at plaintiff's wharf to remove therefrom, whereby the plaintiff was injured and deprived of his wharfage, where the jury were charged that it was not enough for the defendant simply to have believed that he had no authority to make the order complained of and to have made the same in good faith, but that he was bound to act with reasonable caution. The defendant was entitled to an instruction that there could be no recovery unless he had acted with a malicious and fraudulent design to injure the plaintiff. *Id.*

See RAILROADS.

NEGOTIABLE INSTRUMENTS.

1. **CERTIFICATE ISSUED BY BANK OR OTHER DEPOSITORY TO GENERAL DEPOSITOR**, stating the fact of the deposit, and that it is payable to the depositor or order on demand, or on the return of the certificate properly indorsed, is in substance and legal effect a promissory note. *Poorman v. Mills*, 90.

2. WHEN NOTE IS INDORSED IN BLANK, TITLE AND RIGHT OF ACTION PASS BY DELIVERY, and while the indorsement remains in blank the note is payable to the bearer. The holder may write over the indorsement, "Pay to the order of the [holder]," which has the effect, in the hands of a *bona fide* holder, of an indorsement in full. *Id.*
3. CHANGE FROM BLANK TO FULL INDORSEMENT OF NOTE IS MATTER OF FORM, and is not required to be made; and a note indorsed in blank is admissible in evidence in support of an allegation that the note was indorsed to the plaintiff by the payee. *Id.*
4. PROOF OF INDORSEMENT OF PROMISSORY NOTE IS NECESSARY TO ENTITLE it to admission in evidence, unless waived when the indorsement is offered in evidence. *Id.*
5. FACT OF INDORSEMENT ONLY NEED BE PLEADED TO SHOW TITLE IN PLAINTIFF, in an action on a promissory note by an indorsee, and an averment in the answer that the plaintiff is not the legal owner or holder of the note does not meet the allegation of indorsement, the fact upon which the plaintiff's title depends, and raises no issue. *Id.*
6. INDORSEMENT OF PROMISSORY NOTE TO AGENT TRANSFERS TITLE THEREOF, as to all the parties except his principal, and the agent may maintain an action thereon in his own name. *Id.*
7. INDORSEE OF PROMISSORY NOTE IS PRESUMED TO BE HOLDER FOR VALUE, and the burden is on the party denying to rebut this presumption. *Id.*
8. IN ACTION ON PROMISSORY NOTE BY INDORSEE, NEITHER QUESTIONED, whether the plaintiff holds as an agent, or is a holder for value, can be considered on the motion for a nonsuit. *Id.*
9. RECITAL OF CONSIDERATION IN PROMISSORY NOTE IS NOT NOTICE OF FAILURE OF CONSIDERATION, nor sufficient to put one upon inquiry, so as to defeat the claim of *bona fide* purchaser of the note before maturity. *Bank v. Barrett*, 384.
10. MAKER OF NOTE WHO TOOK AS CONSIDERATION THEREFOR CHECK FOR TEN THOUSAND DOLLARS, and not for so many confederate dollars, and deposited it in bank to his credit, cannot show in defense to the note that the check was paid in confederate money; for if he received anything but lawful money of the United States, he did so at his own risk. *Bank v. McClellen*, 551.
11. BILL OF EXCHANGE DOES NOT LOSE ITS NEGOTIABILITY by being discounted by the acceptor before maturity; and if he reissues it before it falls due to one who takes it in good faith for a valuable consideration, the indorsers will be liable to the holder in the same manner as if the bill had not passed through the acceptor's hands. *Rogers v. Gallagher*, 583.
12. PRE-EXISTING INDEBTEDNESS IS GOOD CONSIDERATION for reissue to his creditor, before it falls due, of a bill of exchange which the acceptor has discounted before maturity. *Id.*
13. BURDEN OF PROVING WANT OR FAILURE OF CONSIDERATION for negotiable instrument is upon the party pleading it, and it also devolved upon him to show that plaintiff, who received the note before maturity, had notice of such defense at the time he received it. *Mitchell v. Deeds*, 621.
14. PROMISE TO ACCEPT NON-EXISTING BILL OR CHECK TO CONSTITUTE ACCEPTANCE need not describe it by its date and amount and the name of the drawee, as that would be generally impossible; but merely in such a mode that there could be no possible doubt as to the application of the promise to the bill to be drawn; and a description of sufficient certainty

could thus be made to apply to a series of bills as well as to one bill, *semble*. *Nelson v. First National Bank*, 510.

15. RECOVERY MAY BE HAD IN ACTION FOUNDED UPON BREACH OF PROMISE TO ACCEPT, though it cannot be had upon the bill as an accepted bill for lack of certainty in the promise; and the rights of the parties are equally secure and attainable in the former action. *Id.*
16. REMEDY AT LAW BY ACTION FOR BREACH OF PROMISE TO ACCEPT BILL is so complete that a bill in equity will not lie to enforce this liability; but in this case, as no objection was taken to the jurisdiction in chancery, either in the court below or on appeal, and as the case was not one in which a court of chancery for its own protection need refuse to exercise jurisdiction, it was considered upon its merits, and the decree of the lower court dismissing the bill for want of equity was reversed, and the cause remanded. *Id.*
17. THERE IS NO VARIANCE WHERE DECLARATION SETS OUT NOTE SIGNED BY ZELOTES TERRY, and proof is offered to show that it is the note of Zelotes Terry, Trustee for the East family of Shakers. *Pease v. Pease*, 225.
18. UNDER LAW OF MASSACHUSETTS, IF NEGOTIABLE INSTRUMENT IS EXECUTED BY AGENT IN HIS OWN NAME ALONE, though in behalf of an undisclosed principal, it cannot be enforced against the latter; therefore, upon principles of agency alone, a note given in that state by Zelotes Terry could not be enforced against Zelotes Terry, Trustee, etc. But as to the admissibility of parol evidence to charge an unnamed principal in a non-negotiable instrument, the law of that state seems to be unsettled. *Id.*
19. NEGOTIABLE NOTE SIGNED "ZELOTES TERRY" MAY BE PROVED BY PAROL to be the note of Zelotes Terry, Trustee for the East family of Shakers, not upon the ground of agency, but upon the principle that Zelotes Terry is the business name of the community. *Id.*
20. NON-NEGOTIABLE INSTRUMENT SIGNED "ZELOTES TERRY, TRUSTEE," MAY BE PROVED BY PAROL to be the note of Zelotes Terry, Trustee of the East family of Shakers; for the words, "Zelotes Terry, Trustee," may mean something more than the mere name of the agent. They may be the corporate name of the community. *Id.*
21. ADOPTION OF NAME SIGNED TO NEGOTIABLE NOTE MAY BE PROVED BY PAROL. A Shaker community in Connecticut, by law, and by the terms of a covenant signed by its members, transacted business in the name of a trustee appointed by the elders. A negotiable note, signed "Zelotes Terry," was given in Massachusetts for lands bought for the community. Terry was in fact a trustee at the time, and as a member of the community was disqualified from doing any private business. *Held*, that the case was to be governed by the laws of Massachusetts; and that, while the principals would not be liable under those laws, if the signature were regarded simply as that of an agent to a negotiable note, yet the community might have adopted the name of Zelotes Terry as their business name, and that parol evidence was admissible to show that they had done so. *Id.*
22. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT NAME SIGNED TO NON-NEGOTIABLE INSTRUMENT IS CORPORATE NAME, and that Zelotes Terry, Trustee, means Zelotes Terry, Trustee for East family of Shakers. A non-negotiable instrument, given for land bought for the community, was signed "Zelotes Terry, Trustee." *Held*, that as the community

was authorized to do business in the name of its trustee for the time being, and could sue and be sued in that name, and had no specific corporate name, the name of such trustee, with a term indicating his official character, was properly the corporate name of the community; and that parol evidence was admissible to show that Zelotes Terry, Trustee, meant Zelotes Terry, trustee of the community. *Id.*

See CORPORATIONS, 6, 13, 14; LIS PENDENS; PLEDGE, 1; USURY.

NOTARIES.

NOTARY PUBLIC, WHO IS ATTORNEY AT LAW, is not authorized to take the affidavit and bond of his client and issue the attachment in a case where he is employed. *Wilkowski v. Hall*, 374.

NOTICE.

See LIS PENDENS.

OFFICE AND OFFICERS.

PUBLIC OFFICERS SHOULD BE MADE TO ANSWER IN DAMAGES TO ALL PERSONS who may have been injured through their malfeasance, omission, or neglect; but if the damages would have been sustained notwithstanding the misconduct of the officer, or if the injured party has by his fault or neglect contributed to the result, the officers cannot be held responsible. *Lick v. Madden*, 175.

See APPLICATION OF PAYMENTS, 5; BONDS.

PARENT AND CHILD.

See FRAUDULENT CONVEYANCES; NEGLIGENCE.

PARTITION.

1. **UNDER CALIFORNIA PRACTICE, ACTIONS SHOULD BE BROUGHT IN NAME** of the real party in interest, and this applies to actions for partition; and a holder under a conveyance by one tenant in common of a specific parcel of the common lands as well as the co-tenants of his grantor, should be made a party to such action. *Gates v. Salmon*, 139.
2. **WHOLE SCOPE AND TENOR OF CALIFORNIA STATUTE RELATING TO PARTITION OF LANDS SHOW** that the intention was to make the one judgment of partition final and conclusive on all persons interested in the property, or any part of it, of whom the court could acquire jurisdiction. Such actions, though regulated to a great extent by the statute, partake more fully of the principles and rules of equity than those of law, both in respect to the mode of procedure prescribed and the remedies provided. *Id.*
3. **PARTIES ARE ENTITLED ON NEW TRIAL OF ACTION FOR PARTITION OF LANDS** ordered by the court on appeal to avail themselves of the documentary evidence used at the former trial, and on file in the court below, including the referee's report of the testimony, and the deeds, exhibits, etc., subject, however, to objection as when first offered. *Id.*

See CO-TENANCY.

PARTNERSHIP.

1. **FIRM CREDITORS HAVE NO SUPERIOR EQUITY TO THAT OF INDIVIDUAL CREDITORS** for payment from the partnership assets. Members of the

partnership have a superior lien on the partnership property for the payment of the firm debts, and the law allows the creditors to avail themselves of this lien, to the exclusion of individual creditors, where it has not been surrendered by the partners; but it is the equitable lien of the partners that is worked out for the benefit of creditors, and not a lien inhering in the creditors themselves. *Haggood v. Cornwell*, 516.

2. **ALL MEMBERS OF FIRM MAY AGREE TO APPROPRIATION OF FIRM PROPERTY** in payment of an individual debt of one of the partners, and his creditor takes the property discharged of any claim or equity of the partnership creditors, since the members of the firm have expressly parted with their lien, and the firm creditors have none except through the partners. *Id.*
3. **PARTNER PURCHASING ENTIRE INTEREST OF COPARTNERS MAY USE FIRM PROPERTY** in payment of his individual debt, and his creditor will take it discharged of any claim or equity of the firm creditors. Nor will it invalidate the transaction that the purchase is made with the express intention of turning over the goods to the creditor of the purchasing partner. *Id.*
4. **INDIVIDUAL CREDITOR IS GUILTY OF NO FRAUD IN REQUESTING HIS DEBTOR** to procure the consent of his copartners, either by purchase or otherwise, to a surrender of partnership property in payment of the individual debt. *Id.*
5. **INDIVIDUAL CREDITOR WHO TAKES FIRM PROPERTY IN PAYMENT OF DEBT** and for an additional valuable consideration paid, after his debtor has purchased the interest of his copartners, and without notice of an agreement by the purchasing partner with his copartners to pay firm debts, is a purchaser for a valuable consideration without notice, and cannot be required to surrender the goods to the firm creditors or to account for their proceeds. *Id.*

PAYMENT.

See APPLICATION OF PAYMENTS.

PLEADING AND PRACTICE.

1. **APPLICATIONS FOR CONTINUANCES** are addressed to the sound legal discretion of the court, and if not expressly provided for, will be granted or refused as the ends of justice may require. *Wilkinson v. Halle*, 374.
2. **OYER IS NEVER GRANTED OF INSTRUMENTS NOT UNDER SEAL.** *Commercial I. Co. v. Mehlman*, 543.
3. **ORDER OF COURT BELOW DISMISSING ACTION FOR WANT OF PROSECUTION WILL NOT BE REVERSED** by the supreme court unless there has been an abuse of discretion; and it is incumbent on the appellant to establish affirmatively that there has been such abuse of discretion. *Grigsby v. Napa Co.*, 213.
4. **COURT IS JUSTIFIED IN DISMISSING ACTION BECAUSE OF PLAINTIFF'S WANT OF DILIGENCE** in allowing an action to rest, without service of summons, for two years and eight months after the summons is issued. *Id.*
5. **ACTION MAY BE DISMISSED BY COURT FOR WANT OF PROSECUTION, NOTWITHSTANDING ENTRY OF DEFAULT**, where the notice to dismiss is given before summons is served, and the plaintiff then serves the summons, and at the end of ten days takes a default, but judgment is not entered up. The dismissal takes effect by relation back to the time of service of the motion. *Id.*

6. INTRODUCTION OF PROOF BY PLAINTIFF AT TRIAL, IN SUPPORT OF MATERIAL AVERMENTS in his complaint, which were so defectively denied that, upon motion, such denials might have been stricken out as sham and irrelevant, is a waiver of all objections to the sufficiency of said denials; and an instruction to the jury, asked by the plaintiff, to the effect that the facts so averred were admitted to be true for all the purposes of the trial, may properly be refused. *Tynan v. Walker*, 152.
7. PLAINTIFF WHO REGARDS DENIALS CONTAINED IN ANSWER AS INSUFFICIENT may take advantage of the fact, by a motion to strike them out on the ground that they are sham and irrelevant. *Id.*
8. DENIALS CONTAINED IN ANSWER MAY BE STRICKEN OUT, on motion, as sham and irrelevant, when they do not explicitly traverse the material allegations of the complaint. *Id.*
9. IN ACTION FOR DAMAGES FOR ASSAULT AND BATTERY, DEFENDANT CANNOT SET UP, by way of counterclaim, a libel published by the plaintiff of and concerning the defendant. *Mardouyall v. Maguire*, 98.
10. OBJECTION TO LIBEL SET UP IN ANSWER AS COUNTERCLAIM, in an action for an assault and battery, is not waived by a failure to demur, and evidence to support it is inadmissible. *Id.*
11. MEMORANDUM ATTACHED TO BILL OF EXCEPTIONS, SIGNED BY ADVERSE PARTY, admitting that the bill is correct, and agreeing that it may be signed by the judge as of the date of its filing, is not a waiver of the objection that it was not presented to the judge within the time limited by the court. The presumption is, that it was so signed; but where that date is after the time limited, the bill is not properly in the record. *Earl v. Dresser*, 560.
12. FACT WILL BE DEEMED ESTABLISHED WITHOUT PROOF which is affirmatively alleged both in the petition and answer, although the answer contains also a general denial, and the plaintiff filed a reply in general denial of the allegations of the answer. *Curt v. Watson*, 763.
13. EFFECT AS EVIDENCE OF COPIES OF ORIGINAL DEEDS IS NOT DEFEATED by the fact that they are attached to the amended instead of the original petition, and thus introduced, where the agreement was to waive the introduction of original deeds, and consent by defendant to the admission of copies "attached to the original petition." *Curt v. Watson*, 763.
14. NEW TRIAL WILL NOT BE GRANTED FOR IMPROPER ADMISSION OF EVIDENCE, where it is clear that the case could not have been affected by it. *Redfield v. Buck*, 241.
15. INSTRUCTION ASSUMING THAT THERE IS NO EVIDENCE TENDING TO ESTABLISH a proposition is not ground for reversal, if such is the case. *Sharp v. Parks*, 565.
16. VERDICT WILL NOT BE DISTURBED, unless it is manifestly against the weight of the evidence. *Toledo R. R. Co. v. Harmon*, 489.
17. VERDICT WILL NOT BE DISTURBED BY SUPREME COURT BECAUSE AGAINST WEIGHT OF EVIDENCE, if the evidence is conflicting. *Van Duren v. Star Q. M. Co.*, 209.
18. JUDGMENT WILL NOT BE REVERSED FOR ADMISSION OF ERRONEOUS TESTIMONY, if the appellant has suffered no injury from its admission. *Moon v. Rollins*, 181.
19. NEW TRIAL WILL NOT BE GRANTED ON GROUND that the court erroneously permitted the respondent to introduce evidence upon a matter not denied in the answer, if the appellant was not prejudiced thereby. *Tully v. Harloe*, 102.

20. SUPREME COURT OF CONNECTICUT NEVER REVIEWS QUESTIONS OF FACT. It takes them as they are found by the court below. *Easterly v. Goodwin*, 237.
 21. FINDING OF COURT BELOW WILL NOT BE DISTURBED BY SUPREME COURT, where there is a substantial conflict in the evidence, although the supreme court may be of the opinion that there is a preponderance of evidence against the finding. *Lick v. Madden*, 175.
 22. COURT SHOULD CHARGE JURY IN WRITING when requested to do so, and without any verbal additions or explanations. *Campbell v. Miller*, 390.
 23. WRITTEN REQUEST TO CHARGE JURY MUST BE APPLICABLE TO FACTS AND TO LAW, or the court need not notice it; and the court may give the charge with verbal modifications, but the whole taken together must be correct. *Id.*
 24. IF INSTRUCTIONS ARE NOT MODIFIED OR CHANGED BY ANY ORAL CHARGE, but go to the jury as they were written, there is no violation of the provision of the code requiring all instructions to be in writing, although the court repeated orally a part of one of the charges, and in reading another charge remarked orally that he had not intended to read so far as he had, and then re-read the charge as he intended to give it. *Pate v. Wright*, 705.
 25. ERRONEOUS INSTRUCTION TO JURY CANNOT BE MADE AVAILABLE, ON APPEAL, as error, by the party on whose motion it was given. *Minot v. Mitchell*, 685.
 26. ERRONEOUS ENTRY OF CLERK AS TO TIME FOR NEW TRIAL, EFFECT OF. — Where a motion for a new trial was taken to the "next term" of the supreme court to be holden in the county, without describing the term, and the next term was that of September, 1867, to which term alone the motion could by law be taken, and the clerk of the court in his record had described the term to which it was taken as "the next term to be holden on the second Tuesday of February, 1868," at which latter term he entered the case on his docket, it was held, on a motion to strike the case from the docket, that the motion for a new trial was to be regarded as taken to the September term, and the clerk's entry as an error, and that the case should be treated as if it had been entered in the docket of the September term and properly continued. *Redfield v. Buck*, 241.
- See CORPORATIONS, 22-24; INJUNCTIONS; INTERPLEADER; LABEL; PARTITION; REPLEVIN.

PLEDGE.

1. PLEDGER WHO TAKES SHARES OF CORPORATE STOCK AS COLLATERAL SECURITY for a promissory note, with authority to sell in case of the non-payment of the note, is not bound to sell upon default in the payment of the note, and is not liable for a loss occasioned by a depreciation in the value of the stock occurring after the default. *Hout v. McClelland*, 551.
2. FACTOR HAS NO POWER TO PLEDGE PRINCIPAL'S GOODS, at the common law, for advances made on his own account, and this rule has not been changed by section 2179 of the Georgia code. *First Nat. Bank v. Nelson*, 400.
3. DELIVERY IS ESSENTIAL TO CONSTITUTE PLEDGE at the common law, and under section 2110 of the Georgia code, and cannot be dispensed with by merely setting aside the article pledged, or by the pledgor's consenting to act as bailee thereof for the pledgee. *Id.*

4. IT IS SUCH EVIDENCE OF NOTICE OF AGENCY AS WILL BIND BANK ADVANCING MONEY TO AGENTS on the security of goods in their possession, where the fact of the agency was advertised in the city in which the bank was situated, and was painted on the agent's sign, and was well known among business men to exist. *Id.*

POSSESSION.

See ABANDONMENT.

PRESCRIPTION.

RIGHT TO LAND BOATS AND TO LOAD AND UNLOAD FREIGHT, and thus encumber the land, cannot be acquired by the public by prescription or custom. Whoever claims it by long usage must prescribe in a *que estate*. *Talbot v. Grace*, 703.

PROBATE COURTS.

1. DECREE OF PROBATE COURT, UNLESS APPEALED FROM, IS FINAL AND CONCLUSIVE upon the parties as to all matters within its jurisdiction which are necessarily involved in the issue; but this general rule applies only to final decrees. *Mix's Appeal*, 222.
2. DISTINCTION IS TO BE OBSERVED BETWEEN ORDERS AND DECREES MADE DURING SETTLEMENT OF ESTATE which are merely preparatory to a final settlement and distribution, and a final decree adjusting and closing an administration account. The latter only possesses the elements of a final judgment; the former are preliminary, and subject to change or modification, as the exigencies of the case and the demands of justice require. *Id.*
3. COURTS OF PROBATE, AS TO ALL MATTERS WITHIN THEIR JURISDICTION, ARE CLOTHED WITH CHANCERY POWERS to do full justice between the parties; and like a court of chancery, has power, in rendering a final decree, to correct mistakes in its prior proceedings. *Id.*
4. COURT OF PROBATE HAS POWER, IN ITS FINAL DECREE SETTLING ADMINISTRATION ACCOUNT, TO CORRECT ANY ERRORS made in any former and partial settlement of the account; and evidence may be admitted to prove such mistakes. *Id.*
5. ON APPEAL FROM DECREE OF PROBATE COURT SETTLING ADMINISTRATION ACCOUNT, BUT REFUSING TO ALLOW CORRECTION OF ERROR IN FORMER SETTLEMENT, APPELLEES OFFERED TO PROVE that the appellant had received certain personal property belonging to the estate, which was not inventoried, and not accounted for in the administration account, and with which the administrator ought, as they claimed, to be charged: *held*, to be inadmissible, as the pleadings contained no reference to this matter; that if they did, such evidence could not affect the error in the former settlement, and that the error should be corrected in the former settlement, and the appellees left to their appropriate remedy, — a suit on the bond. *Id.*

QUO WARRANTO.

1. INFORMATION IN NATURE OF QUO WARRANTO ORIGINALLY ISSUED ONLY AT INSTANCE OF SOVEREIGN against any person who usurped any franchise or liberty against the king, or for misuser or non-user of franchises or privileges granted by him. *State v. Curtis*, 263.

2. **STATUTE OF 9 ANNE EXTENDED INFORMATION IN NATURE OF QUO WARRANTO** so that it could issue at the relation of any person against any other person usurping, intruding into, or unlawfully holding any franchise or office in any corporation. *Id.*
3. **IN ENGLAND INFORMATION IN NATURE OF QUO WARRANTO LIES IN NAME OF SOVEREIGN** against those who usurp sovereign franchises, because such usurpation is in derogation of the rights of the crown. *Id.*
4. **IN UNITED STATES INFORMATION IN NATURE OF QUO WARRANTO LIES IN NAME OF GOVERNMENT** against those who usurp sovereign franchises, because such franchises are grantable or granted by the commonwealth. *Id.*
5. **INFORMATION IN NATURE OF QUO WARRANTO CAN LIE ONLY IN NAME OF UNITED STATES**, and in the federal courts, against those who invade a franchise granted by the national government. *Id.*
6. **INFORMATION IN NATURE OF QUO WARRANTO WILL NOT LIE IN STATE COURT** to try the right to the office of director in a bank organized under the national currency act. This is one of that class of cases where jurisdiction in the state court is utterly incompatible with the necessary jurisdiction of the national government. *Id.*
7. **JURISDICTION TO ISSUE INFORMATION IN NATURE OF QUO WARRANTO FROM STATE COURT**, to try the right to the office of director in a bank organized under the national currency act, is not conferred by the amended currency act of 1864, section 57, which provides that suits against the national banks may be instituted in either the federal or state courts. *Id.*
8. **PROCEEDING BY QUO WARRANTO IS CIVIL IN CHARACTER**, and a party applying for a change of venue in such proceeding, showing all the requisite facts thereto, is entitled to a change of venue as a matter of right. The Illinois act of 1861, giving the court discretionary power to grant a change of venue in certain criminal proceedings, does not embrace a proceeding by *quo warranto*. *Ensminger v. People*, 495.

RAILROADS.

1. **RAILROAD COMPANIES WILL BE HELD TO EXERCISE OF INCREASED CARE** and diligence, commensurate with the greater hazard, in operating their franchises in populous cities and over public thoroughfares. *Toledo R. R. Co. v. Harmon*, 489.
2. **RAILROAD COMPANY MAY, IN EXERCISING ITS FRANCHISES, INCUR LIABILITY** for expense on account of injury received by its employees, although the charter may not, in terms, authorize the company to incur such expense. *Toledo R. R. Co. v. Rodriguez*, 484.
3. **IT IS SUFFICIENT CONSIDERATION TO SUPPORT EXPRESS AGREEMENT** to pay for the nursing and medical attendance necessary to the cure of a railroad employee, that he was disabled while in the employ of the company, and in the discharge of his hazardous duties. *Id.*
4. **IT IS WITHIN SCOPE OF AUTHORITY OF GENERAL SUPERINTENDENT OF RAILROAD TO BIND** the company, on his consent implied, for the payment of expenses incurred on account of injuries received by the company's employees. *Id.*
5. **RAILROAD SUPERINTENDENT MAY BIND COMPANY BY CONSTRUCTIVE CONSENT.** An employee of a railroad company was injured while in the discharge of his duty, and the station agent, as such, procured a nurse and medical attendants, promising that the company would pay such

expenses. He then wrote to the general superintendent stating the facts. *Hell*, that it must be presumed that the letter was received, and in the absence of any answer thereto, that the superintendent consented on the part of the company to assume the liabilities of the station agent. *Id.*

6. RAILROAD COMPANY WILL BE LIABLE, where its employee performs an act incident to his employment, so unskillfully, negligently, recklessly, or wantonly that persons whose fault does not contribute are thereby injured; and the company is not released from liability by the fact that the wrongful acts were in violation of rules or by-laws, or against particular instructions of the company. *Toledo R. R. Co. v. Harmon*, 489.
7. RAILROAD COMPANY IS LIABLE ONLY AS WAREHOUSEMAN after depositing goods in its warehouse at the end of transportation, and is not responsible for their loss in the absence of negligence. *Francis v. Dubuque & S. C. R. R. Co.*, 769.
8. LIABILITY OF RAILROAD COMPANY AS COMMON CARRIER OF FREIGHT ENDS, and that of warehouseman begins, when the goods have arrived at the point of destination, and are there deposited in the company's warehouse to await the convenience of the assignee. But if the goods should arrive out of time, and the company failed to notify the consignee, its liability as a common carrier might be extended. *Id.*

See NEGLIGENCE.

REGISTRATION.

IT IS NO MORE NECESSARY UNDER IOWA RECORDING ACT TO ENTER NAMES OF BOTH HUSBAND AND WIFE in the index of conveyance of the homestead, in order to impart notice, than of any other real estate wherein both join. Nor it is necessary that the index should contain a full description of the premises. *Hodgson v. Lovell*, 775.

See CORPORATIONS, 8.

REPLEVIN.

1. ACTION TO RECOVER POSSESSION OF PERSONAL PROPERTY MAY BE DEFEATED by a showing that during the pendency of the action, and before a trial thereof, the defendant has been required to deliver, and has delivered, the property to a third person, entitled to its possession as against both plaintiff and defendant. *Bolander v. Gentry*, 162.
2. WHERE ANSWER IN REPLEVIN DOES NOT DENY VALUE OF PROPERTY alleged in the complaint, evidence as to its value should not be admitted. *Tully v. Harloe*, 102.
3. DESCRIPTION OF PROPERTY IN COMPLAINT IN REPLEVIN as "one white sheet of the value of fourteen dollars," is sufficiently explicit. *Onest v. Beam*, 695.

RESTRAINT OF TRADE.

See CONTRACTS, 11-14.

RIPARIAN RIGHTS.

1. TITLE OF RIPARIAN OWNER OF LAND IN ILLINOIS BOUNDED by the Ohio River extends at least to low-water mark. *Ensminger v. People*, 495.
2. RIPARIAN OWNER WHOSE LINE EXTENDS TO LOW-WATER MARK HAS RIGHT TO EXCLUSIVE USE of the bank to such mark, and may establish a private wharf thereon, and charge what is reasonable for its use by those navigating the river. *Id.*

3. PROPERTY OF RIPARIAN OWNER IN BED OF RIVER TO FILUM AQUÆ IS SUBJECT TO PUBLIC SERVITUDE as a highway for the purposes of navigation, but the banks are not subject to that servitude, unless so made subservient by agreement, prescription, or grant. *Id.*

SALES.

1. REAL CHARACTER OF TRANSACTION IS NOT AFFECTED BY NAME GIVEN TO IT. Thus a conditional sale is such, though it be called a lease. *Murch v. Wright*, 455.
2. CONDITIONAL SALE WITH RIGHT OF RESCISSION — TRANSACTION NOT LEASE THOUGH CALLED SUCH — VENDOR'S LIEN UNAVAILING AGAINST CREDITOR WHEN. — Under a written agreement, a piano worth seven hundred dollars was delivered to a purchaser, who, on taking it, paid fifty dollars, which was called the rent of the piano for the first month, and he was to pay fifty dollars at the beginning of each month thereafter for thirteen months; the piano to become the property of the purchaser in the event of his paying seven hundred dollars within the thirteen months, all past payments of rent to count as a part of the seven hundred dollars: *held*, that this transaction, though called a lease, was not such, but a conditional sale of the piano, with a right of rescission on the part of the vendor in the event that the purchaser should fail in paying the installments; and that if, while in the purchaser's possession, it was levied upon by his creditors, the vendor's lien would have to yield. *Id.*
3. OWNER OF STOLEN PROPERTY MAY MAINTAIN ACTION FOR ITS VALUE against a person who has innocently bought it from the thief, and resold it in good faith, if the property itself has passed beyond the reach of the owner. *Sharp v. Parks*, 565.

SEALS.

See CONTRACTS, 6-9.

SERVITUDES.

- SERVIENT OWNER HAS NO RIGHT, BY ERECTION OF EMBANKMENTS or by other artificial means, to stop the natural flow of surface water from the dominant heritage, and thus throw it back upon the latter. *Gillham v. Madison R. R. Co.*, 627.

SHERIFFS.

1. SHERIFF, CALLED UPON TO EXECUTE WRIT OF ATTACHMENT OR EXECUTION, MAY DEMAND INDEMNITY of the plaintiff in the writ, it seems, before he can be required to seize property in the possession of third persons claiming to be the owners; and if he is not indemnified on demand, and thereupon returns the writ *nulla bona*, an action for a false return cannot be maintained against him, although it should turn out that the goods belonged to the defendant in the writ. *Long v. Neville*, 199.
2. SHERIFF, CALLED UPON TO SERVE WRIT BY ATTACHING PROPERTY OR ARRESTING PERSON, HAS RIGHT TO DEMAND INDEMNITY of the plaintiff in the writ, it seems, before executing the writ, if there is reasonable doubt as to the ownership of the property, or the identity of the person. *Id.*
3. SHERIFF IS NOT JUSTIFIED IN ALL CASES IN TURNING OUT, UNDER WRIT OF POSSESSION, PERSONS IN POSSESSION, who are not parties to the ac-

tion, or named in the writ, even though they may have entered after action brought. *Id.*

4. SHERIFF, CALLED UPON TO ISSUE WRIT OF POSSESSION, HAS RIGHT TO DEMAND INDEMNITY of the plaintiff, before executing the writ, if he finds persons in possession who are not parties to the action or named in the writ, and who claim to be rightfully in possession, and there is reasonable doubt whether he has a right to turn them out; and this, although the premises are specifically described in the writ. *Id.*

See EXECUTIONS; JUDICIAL SALES.

SLANDER.

IT IS NO DEFENSE TO ACTION OF SLANDER that the defendant was intoxicated at the time of speaking the slanderous words. *Reed v. Harper*, 774.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE. — VENDOR IS BOUND TO CONVEY TITLE TO LAND WHICH HE SELLS AND COVENANTS FOR IN HIS OBLIGATION; and if from his negligence or default the title has been lost, or the property becomes encumbered by judgments, taxes, forfeiture, or otherwise, before the time for conveying the same, or before he offers to perform his contract, or before a rescission of the contract, he cannot insist upon performance by the other party until he relieves the title from such subsequent encumbrance. *Cooper v. Tyler*, 442.
2. APPLICATION TO COURT OF EQUITY TO DECREE SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY REAL ESTATE IS ADDRESSED TO DISCRETION OF COURT, AND WILL NOT BE GRANTED unless the contract is made according to the requirements of the law, and is equitable, reasonable, certain, mutual, on good consideration, consistent with policy, and free from fraud, surprise, or mistake. *Patterson v. Bloomer*, 218.
3. MISTAKE OF LAW AS TO EFFECT OF CHATTEL MORTGAGE. — It was held that vendor was justified in refusing to convey real estate, and that he ought not to be compelled to convey, in the exercise of the discretion of a court of equity, where he, residing in the state of New York, made a contract for the sale a quarry in Connecticut, and of personal property valued at twenty-five thousand dollars connected with it, the whole for fifty-five thousand dollars, of which five thousand dollars was to be paid down, the balance to be secured by a mortgage back, but where he made the agreement under the mistaken belief that a chattel mortgage would be a valid security in Connecticut without a retention of possession by him; and where the purchaser was insolvent. *Id.*

STATUTES.

1. WHEN STATUTE IS AUTHENTICATED BY SIGNATURES OF PRESIDING OFFICERS of the two houses of the legislature, the courts will not search further to ascertain whether or not such facts existed as gave constitutional warrant to those officers to thus authenticate the act as having received legislative sanction in such manner as to give it the force of law. *Evans v. Browne*, 710.
2. UNIVERSAL RULE IN CONSTRUING STATUTE IS, that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its

- general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto. *Tynan v. Walker*, 152.
3. **STATUTE MUST BE SO CONSTRUED AS TO GIVE EFFECT**, if possible, to every portion of it, and without rejecting any part as surplusage, or treating it as a repetition of a provision already made. *Gates v. Salmon*, 139.
 4. **COURT MUST GIVE TO LANGUAGE OF STATUTE, WHICH IS DEFICIENT IN PRECISION** and clearness, and faulty or imperfect in phraseology or structure, such an interpretation as may appear best adapted to effectuate the object contemplated in its enactment; and it is always to be presumed, in such case, that the legislature intended that the most reasonable and beneficial interpretation should be given to the language which they have used. *Pickering v. Day*, 291.
 5. **WHERE LANGUAGE OF STATUTE IS NOT CLEAR**, and it is obvious that by a particular construction great public interests would be endangered or sacrificed, the court ought not to presume that such construction was intended by the makers of the law. *Id.*

STATUTE OF FRAUDS.

1. **PROMISE, IN STATUTE OF FRAUDS, TO ANSWER FOR DEBT, ETC., OF ANOTHER MEANS** an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable. *Parker v. Benton*, 246.
2. **PROMISE TO ANSWER FOR DEBT OF ANOTHER IS WITHIN STATUTE OF FRAUDS WHEN AND WHEN NOT.** — Where a person not before liable agrees to pay the debt of a third person, and as a part of the arrangement the original debtor is discharged from his indebtedness, the agreement is not within the statute of frauds. But it is otherwise if the original debtor continues liable. *Id.*
3. **INDEBITATUS ASSUMPSIT WILL LIE ON ABSOLUTE CONTRACT TO PAY** — SUCH CONTRACT IS NOT AFFECTED BY USE OF WORD "GUARANTEE" WHEN. — Where a person not before liable agrees "to pay and guarantee" the debt of a third person, and as part of the arrangement the original debtor is discharged from his indebtedness, the word "guarantee" is not to be understood in a technical sense; the agreement is an absolute one to pay, and *indebitatus assumpsit* will lie. *Id.*

STATUTE OF LIMITATIONS.

1. **STATUTES OF LIMITATIONS ARE TO BE STRICTLY CONSTRUED.** General words in the statute must receive a general construction, and if there be no express exception, the courts can create none. *Tynan v. Walker*, 152.
2. **FACT THAT THERE IS NO PERSON IN EXISTENCE COMPETENT TO SUIT** does not prevent the operation of the statute of limitations. So held in an action of ejectment, where the owner of the land had died, and his estate remained for many years without administration, and there was no one capable of suing for possession thereof. *Id.*
3. **CALIFORNIA STATUTE OF LIMITATIONS CONTAINS NO PROVISION** excepting from its operation a case where the party who would have been entitled to sue dies before the cause of action has accrued. In such case, the persons interested in his estate — his creditors, heirs, and devisees — have the full time allowed by the statute in which to obtain a grant of administration and commence an action. *Id.*

4. CALIFORNIA STATUTE OF LIMITATIONS OF 1850 DOES NOT RUN AGAINST MARRIED WOMAN DURING COVERTURE; but under the amendment of 1863 it runs against a married woman in all those actions to which her husband is not a necessary party plaintiff with her. *Wilson v. Wilson*, 194.
5. STATUTE OF LIMITATIONS RUNS AGAINST MUNICIPAL OR PUBLIC CORPORATIONS, though not against the state or sovereignty. *Pella v. Scholte*, 729.
6. RIGHT OF CITY TO MAINTAIN ACTION FOR RECOVERY OF SQUARE THEREIN, on the ground that the owner had dedicated it to the city, is barred where the owner openly, visibly, and to the knowledge of the city, held possession of the square, claiming title, for the statutory period of limitation after the city's cause of action accrued. *Id.*
7. MERE ENTRY NOT FOLLOWED BY POSSESSION WILL NOT SUSPEND RUNNING OF STATUTE OF LIMITATIONS at common law, where the possession of the occupant was originally lawful, and he subsequently refuses to surrender it to one who afterwards acquired the right of property, for this amounts to a forfeiture. *Id.*
8. FORCIBLE ENTRY BY CITY UPON SQUARE CLAIMED TO HAVE BEEN DEDICATED is not equivalent to an action, and will not suspend the running of the statute of limitations against the city, where the original owner immediately obtained an injunction restraining the city from disturbing his possession, which he immediately resumed. *Id.*
9. CONTINUING CONTRACT AND NEW CONTRACT MAY BE PROVED, it seems, under section 31 of the California statute of limitations, which provides that "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this statute, unless the same shall be contained in some writing, signed by the party to be charged thereby." The acknowledgment or promise made while the contract is a subsisting liability establishes a continuing contract, and when made after the bar of the statute, a new contract is created. *McCormick v. Brown*, 170.
10. STATUTE OF LIMITATIONS DOES NOT OPERATE TO EXTINGUISH DEBT or raise a presumption of payment, it seems, but only bars the remedy, and thus becomes a statute of repose. *Id.*
11. CAUSE OF ACTION IS FOUNDED UPON NEW PROMISE, and not upon the original contract, it seems, where a creditor relies upon a new promise after the statute has run upon the original contract; the original contract, or the moral obligation arising thereupon, being the consideration for the new promise. *Id.*
12. ACTION ON NEW PROMISE TO PAY JUDGMENT MUST BE BROUGHT WITHIN FOUR YEARS from the making of the new promise, it seems, to avoid the bar of the California statute of limitations, under section 17, which provides that an action upon any contract, obligation, or liability founded upon an instrument in writing, other than a judgment or decree, must be brought within four years. *Id.*
13. CREDITOR CANNOT RECOVER AFTER STATUTE OF LIMITATIONS HAS RUN UPON ORIGINAL CONTRACT or obligation, without proving a new promise. *Id.*
14. NEW PROMISE, TO REMOVE BAR OF CALIFORNIA STATUTE OF LIMITATIONS, MAY BE EXPRESS OR IMPLIED. An express promise must be proved by producing the promise itself; while an implied promise must be proved by the production of the acknowledgment from which the promise is implied. *Id.*

15. **ACKNOWLEDGMENT, TO TAKE CASE OUT OF OPERATION OF STATUTE OF LIMITATIONS**, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay. Such acknowledgment cannot be deduced from a promise or an offer to pay a part of the debt, or to pay the whole debt in a particular manner, or at a specified time, or upon specified conditions. *Id.*
16. **CREDITOR CANNOT RECOVER UPON OFFER OR CONDITIONAL PROMISE BY DEBTOR TO PAY DEBT**, it seems, without showing an acceptance of the offer or a performance of the condition on his part. *Id.*

STREETS.

See CORPORATIONS, 37-39; DAMAGES, 4.

SUNDAYS.

See CONTRACTS, 15, 16

SURETYSHIP.

1. **ONE OF TWO JOINT OBLIGORS MUTUALLY INTERESTED IN CONSIDERATION HAS RIGHT OF CONTRIBUTION AGAINST THE OTHER**, which, it seems, may be reached by process of garnishment at law, where the original obligation is satisfied by a sale under execution of the property of the former. *Kilgo v. Castleberry*, 406.
2. **GENERAL DOCTRINE THAT CONTRACT OF SURETY SHOULD BE STRICTLY CONSTRUED** is conceded, if by "strictly" is meant that his liability shall not, by implication, be extended beyond the fair scope of the terms of his contract. *Pickering v. Day*, 291.

See BONDS.

TAXATION.

1. **IN ORDER TO AVOID COSTS IN ACTION BY MINORS TO REDEEM FROM TAX SALE**, tender of the amount due the defendant for taxes paid, and that the tender has been kept good, should be shown. *Curl v. Watson*, 763.
2. **TAX SALE—AMOUNT NECESSARY TO REDEEM FROM.**—In a proceeding to redeem from tax sales, it was found that one of the sales was invalid, while the others were valid: *held*, that the plaintiff should pay the amount of legal taxes paid by the defendant, with interest thereon at six per cent, under the invalid sale, and the statute penalty and interest upon the valid sales, and also the subsequent taxes paid by the defendant. *Id.*
3. **OWNER OF ANY INTEREST IN REAL ESTATE SUBJECT TO REDEMPTION FROM TAX SALE MAY REDEEM** the whole property, and the purchaser may require him to redeem the whole, if any. *Id.*
4. **DISCRIMINATION IN TAXATION MAY BE MADE BETWEEN FOREIGN CORPORATIONS and domestic corporations of the same character.** *Ducat v. Chicago*, 529.
5. **TAX IMPOSED UPON CORPORATION IS NOT TAX UPON PERSONS OR PROPERTY** of corporators or stockholders. It is the artificial being, the mere legal entity, which is taxed, and the tax is paid out of its funds. And as a foreign corporation has no *status* as a citizen of the state creating it, the objection that a tax imposed upon it is not uniform cannot be maintained. *Id.*

4. **RIGHT TO REDEMPTION MONEY AFTER CONVEYANCE BY PURCHASER AT TAX SALE.** — A purchaser at a tax sale acquires an equitable interest in the lands sold; and if they are conveyed by him before the time for redemption expires, his grantee acquires such equitable interest, and a right to the redemption money, if the lands are redeemed, as completely between the parties as by an assignment of the certificate of purchase. *Scott v. Kelsey*, 415.
7. **SAME. — BUT IF PURCHASER SHOULD CONVEY SUCH PREMISES TO ONE PERSON,** and assign the certificate to another, both being innocent purchasers, the holder of the certificate might, with some reason, insist on a superior right to the redemption money. *Id.*
8. **PROPER PARTIES PLAINTIFF TO SUIT FOR REDEMPTION MONEY WHERE GRANTEE ACQUIRED NO TITLE.** — Where K., a purchaser at a tax sale, conveyed the lands to C., a married woman, who, without her husband joining in the deed, conveyed them to S., and the premises were redeemed, the redemption money being paid to K., it was held that S. took nothing by such conveyance, and that a suit to recover the redemption money from K. should have been brought by C. and her husband. *Scott v. Kelsey*, 415.

See UNITED STATES REVENUE, 2.

TENDER.

- SPECIFIC CONTRACT TO PAY IN "AMERICAN GOLD COIN," OR "IN GOLD,"** cannot be discharged by payment in legal-tender notes, unless such notes are at par value with gold; but a tender of such notes and the difference between them and the gold is sufficient to discharge the debt. *Myers v. Kaufman*, 367.

See COSTS, 2.

TRADE-MARKS.

1. **MANUFACTURER OF GOODS, OR VENDOR FOR WHOM THEY HAVE BEEN MANUFACTURED,** HAS RIGHT, at common law, to designate them by some peculiar name, symbol, figure, letter, form, or device, whereby they may be known in the market as his own, and be distinguished from other like goods manufactured or sold by other persons. And the courts will protect him in the exclusive use of such mark, when original with him, so far as its serves to indicate the origin and ownership of the goods to which it is attached, to the exclusion of such symbols, figures, and combination of words which may be interblended with it, and merely indicating the name, kind, or quality. *Falkinburg v. Lucy*, 76.
2. **CALIFORNIA TRADE-MARKS STATUTE — CONSTRUCTION.** — By the term "peculiar name, letters, marks, devices, figures, or other trade-mark or name," as used in the statute, is meant, not the proper and established names by which the "articles" are known in the market, nor something indicating their actual kind, character, or quality, but something new, of the manufacturer's own invention, which is peculiar to him, and not common to him and others, and which is intrinsically foreign to the "articles" themselves, and only serving to designate them because it has been fancifully put to that use, in disregard of all natural relations. *Id.*
3. **SAME — SCOPE OF STATUTE.** — The statute does not vest in the manufacturer or vendor, as the case may be, any exclusive property in the thing manufactured or sold, nor in the name or the words which most aptly

- describe it, and if it did, it would be so far void for want of power in the legislature to enact it. *Id.*
4. **SAME—VALIDITY OF STATUTE.**—If the statute goes beyond the common law, and embraces within its protection matter which relates to kind, character, or quality of the thing manufactured or sold, it is not perceived why it does not trench upon the law of copy and patent rights, and is therefore void. *Id.*
 5. **SAME—IN WHAT RESPECT STATUTE INOPERATIVE.**—It is suggested that the matter used in the statute relative to designation of kind and quality was inadvertently incorporated under a mistaken notion of the functions of a trade-mark, and in that respect the statute can have no intelligible operation. *Id.*
 6. **ENTIRE LABEL WILL NOT BE PROTECTED AS TRADE-MARK,** where it contains the name of the article manufactured, a statement of the mode of its use, and a laudation of its qualities; only so much of the label will be protected as indicates that the complainants are the manufacturers or vendors of such article. *Id.*
 7. **PRINCIPLES OF LAW OF TRADE-MARK STATED.** *Boardman v. Meriden B. Co.*, 276.
 8. **TRADE-MARK, WHEN ENTITLED TO PROTECTION.**—A trade-mark adopted by a merchant or manufacturer for his goods is not entitled to protection as his exclusive property, unless it in some manner designates the true origin or ownership of the goods. *Id.*
 9. **HOW ORIGIN AND OWNERSHIP OF GOODS MAY BE DESIGNATED IN TRADE-MARK—VIOLATION OF TRADE-MARK, HOW EFFECTED BY IMITATION OF DEVICE.**—Name of manufacturer, used by him as trade-mark, may have added to and connected with it some peculiar device as auxiliary to the name in declaring the true origin and ownership of his goods; and a wrongful violation of such a trade-mark may be effected, even though the name of the imitator be substituted for that of the original manufacturer by such an imitation of the device as indicates a design to deceive, and is calculated to deceive, the public as to the true origin and ownership of the goods. *Id.*
 10. **FIGURES INDICATING NUMBERS MAY BE PROTECTED AS TRADE-MARKS, ESPECIALLY WHEN THEY ARE ASSOCIATED WITH NAME OF MANUFACTURER** upon labels of certain form, color, and arrangement, and in connection with such labels are used by him to indicate his own manufacture; for by virtue of such connection they form an important part of the trade-mark. *Id.*
 11. **LABELS WITH NUMBERS CONSTITUTE LEGAL TRADE-MARKS, AND ARE ENTITLED TO PROTECTION AS SUCH WHEN.**—Where a manufacturer of britannia spoons, for the purpose of distinguishing them from all other britannia spoons in the market, and for the purpose of designating different classes of his own spoons, adopts several different labels of particular size, form, and color, with his own name thereon, together with some term descriptive of the spoons, and in connection therewith certain figures arbitrarily chosen, the different classes of spoons being indicated by fixed numbers; and these labels constitute the only trade-mark under which he introduces his spoons into market; and under these labels and numbers the spoons have become generally and favorably known, and a large demand has grown up for them; and they are generally bought and sold by the numbers on the labels,—the labels thus arranged and used constitute legal trade-marks, and are entitled to protection. *Id.*

12. SAME — USE OF SIMILAR NUMBERS ON LABELS AS VIOLATION OF TRADE-MARK, THOUGH IMITATOR'S NAME IS USED INSTEAD OF ORIGINAL MANUFACTURER'S. — Where another manufacturer makes spoons similar to those referred to above, though differing somewhat in style, and prepares labels resembling the above, and adopts the same numbers for spoons of a similar kind; the labels being so nearly alike that a purchaser not reading the name upon them might be deceived; and where such labels are adopted with those particular numbers for the purpose of aiding the introduction of his spoons into the market, — it is a violation of the trade-mark of the first manufacturer, although the second manufacturer puts his own name on the labels in the place of that of the first. And the use of the same figures with a cipher prefixed does not vary the case. *Id.*

TRUSTS.

1. PARTY CANNOT BE TREATED AS TRUSTEE, WHO, WITHOUT FRAUD, PURCHASES LAND at sheriff's sale, with his own money, taking the title in his own name, upon a verbal agreement to hold it for the benefit of the execution debtor. *Minot v. Mitchell*, 685.
2. TRUSTEE IN POSSESSION OF TRUST PROPERTY IS ONLY BOUND TO ORDINARY DILIGENCE in its preservation and protection. *Campbell v. Miller*, 389.
3. TRUSTEE MAY RECEIVE PAYMENT OF PROMISSORY NOTES HELD IN TRUST, WHEN DUE, IN SUCH CURRENCY as a prudent man would receive for debts due him individually under similar circumstances. *Id.*
4. TRUSTEE WHO, IN GOOD FAITH, RECEIVED CONFEDERATE TREASURY NOTES IN PAYMENT OF PROMISSORY NOTES HELD IN TRUST, under the Georgia act of 1863, acted under color of law, and is protected by the act of 1866, and the ordinances of the conventions of 1865 and 1868. *Id.*
5. TRUSTEE MIGHT, IN GOOD FAITH, PRIOR TO ADOPTION OF GEORGIA CODE in 1863, RECEIVE PAYMENT OF PROMISSORY NOTES HELD IN TRUST in such currency as was generally received by prudent men in the transaction of their own business, and reinvest the same in the note of a person who was then entirely solvent. *Id.*
6. TRUSTEE WHO RECEIVED CONFEDERATE CURRENCY IN PAYMENT OF PROMISSORY NOTES HELD IN TRUST, before the adoption of the Georgia code in 1863, and after its adoption invested it in securities not authorized by law, and without an order of court, did so at his own risk, and is liable for the value of the currency at the time when it should have been re-invested. *Id.*
7. TRUSTEE WHO CHANGES INVESTMENT OF TRUST FUNDS WITH CONSENT OF CESTUI QUE TRUST, who is of legal age, is not liable for any loss growing out of such new investment. *Id.*
8. TRUSTEE MAY SHOW THAT INVESTMENT OR CHANGE OF INVESTMENT made by him was prudent. *Id.*
9. WHERE RAILROAD COMPANY CONVEYS TO TRUSTEES TO SECURE PAYMENT OF BONDS issued by it certain lands divided into tracts, each described, numbered, and valued, reserving to itself the power to sell any portion of the land at its valuation, and the trustees having power to convey in fee, upon the surrender to them by the company of bonds equal in amount to the value of the land sold, the power of the trustees to convey is a power coupled with an interest, and requires only a substantial compliance with its terms. A deed from the trustees passes the legal

title, and in an action against their grantee, under the Indiana code, for the recovery of real property, on a complaint averring the legal right of the plaintiff to the possession, the equities of the plaintiff cannot be inquired into. *Rowe v. Beckett*, 676.

10. **PERSON TAKING ENTIRE CONTROL AND MANAGEMENT OF CONSOLIDATED CORPORATION**, consisting of several corporations created by laws of different states, and conducting the same as one company for the better security and protection of a mortgagee of some of the corporate property, thereby becomes a trustee, not only for the mortgagee, but also for the mortgagor corporations; and his purchase of the trust property at a foreclosure sale under another mortgage will inure to the benefit of the *cestuis que trust*, upon his being reimbursed the amount of his bid, with interest. And as such trustee, he is bound to account; and it is error to hold that the right of the mortgagor corporation to an accounting will depend on the redemption from the sale to such trustee under the second mortgage. *Racine & M. R. R. Co. v. Farmers' L. & T. Co.*, 595.
11. **IN SUIT AGAINST TRUSTEE OF CORPORATE PROPERTY**, who is managing it for the protection of a mortgagee thereof, to compel an accounting, the decree should be that the account be first taken and stated, and that a reasonable time be given for redemption from a sale to the trustee under a second mortgage, and for payment of such balance as should be found due upon the first-mortgage debt, after deducting the net earnings of the property; and that in default of such redemption and payment being made, the property be sold in satisfaction of the first-mortgage debt. *Id.*
12. **IN ACCOUNTING BY TRUSTEE WHO HAS MANAGED PROPERTY** of mortgagor railroad corporation for the protection of the mortgagee, the mortgagor corporation is entitled to a credit for the earnings of a line of road which had been constructed by such trustee, with money furnished by the mortgagee, along the line of the road owned by the mortgagor, and which, by its contiguity to the latter road, rendered it less valuable than it would otherwise have been. *Id.*

See HUSBAND AND WIFE.

UNINCORPORATED SOCIETIES.

1. **DITCH COMPANIES FOR SALE OF WATER, NATURE OF.** — Ordinary unincorporated ditch companies, organized for the sale of water to miners and others, the stock in which is bought and sold at the pleasure of the owners, without consulting their co-owners, have some of the incidents of ordinary partnerships, but differ therefrom, and are more in the nature of tenancies in common. *McConnell v. Denver*, 107.
2. **MEMBER OF UNINCORPORATED DITCH COMPANY HAS NO GENERAL AUTHORITY** by virtue of such membership to bind the company by his contracts. *Id.*
3. **SUPERINTENDENT OR MANAGING AGENT OF UNINCORPORATED DITCH COMPANY CANNOT BIND** the company by a promissory note, given for materials used by the company, unless authority to do so is conferred upon him by the company, either expressly or by necessary implication from his acts recognized by the company, with full knowledge of the acts at the time of recognition. *Id.*

4. **MEMBERS OF UNINCORPORATED DITCH COMPANY ARE BOUND BY NOTE** duly authorized to be given by its superintendent for materials before then purchased by the company, whether they were such members when the materials were purchased or not. *Id.*
5. **PERSON FURNISHING MATERIALS TO UNINCORPORATED DITCH COMPANY IS NOT ENTITLED** to recover a deficiency against the members of the company, under an agreement for payment out of the proceeds of the ditch of the company, all of such proceeds having been faithfully applied in payment. *Id.*

USAGE.

See **PRESCRIPTION.**

USURY.

PROMISSORY NOTE IS NOT USURIOUS WHICH STIPULATES that the principal shall draw more than the legal rate of interest from date, if the note be not paid when due, unless it appears that interest had been included in the face of the note. *Fisher v. Anderson*, 761.

UNITED STATES REVENUE.

1. **COLLECTOR OF INTERNAL REVENUE DISTRICT, UNDER ACT OF CONGRESS OF JULY 1, 1862,** is the recognized agent of the government, and is responsible to the government and to individuals for all money collected and all acts done by his deputy collectors, who are the agents of the collector, and are responsible to him, and not to the government or individuals, and he may or may not, as he pleases, take security from the deputies for the faithful discharge of their duties. *Pickering v. Day*, 291.
2. **MOLASSES MANUFACTURED FROM SORGHUM IS SUBJECT OF TAXATION,** under the United States internal revenue acts of July 1, 1862, and June 30, 1864. *Id.*
3. **OFFICES OF COLLECTOR AND DEPUTY COLLECTOR OF INTERNAL REVENUE,** as created by the act of Congress of July 1, 1862, are continued under the act of June 30, 1864, by virtue of the saving clauses of that act, which exclude from the operation of the repealing clause the provisions of the former statute creating the offices; and the bonds given by such officers in qualifying under the former act are continued in full force and effect under the latter act, and it was not necessary for either of them to give a new bond after the passage of the latter act. *Id.*
4. **GIVING OF BOND BY COLLECTOR OF INTERNAL REVENUE IS NOT CONDITION** PRECEDENT to his authority to exercise the powers and perform the duties of his office under either act of Congress relative to the collection of internal revenue; but the provision in question is merely directory to the proper officer of the treasury department, and a bond may be required or waived at his discretion. It is intended solely for the security of the government, and constitutes no part of the contract of the sureties of the deputy collector, and his not giving a bond can in no way affect their responsibility.

VENDOR AND VENDEE.

1. **ASSIGNMENT OF NOTE GIVEN TO SECURE PURCHASE-MONEY OF LAND** carries with it the vendor's lien on the property; and it makes no difference that the payor is under the disability of coverture at the time of the execution of the note. *Perry v. Roberts*, 689.

2. COVERTURE IS NOT BAR TO SUIT TO ENFORCE VENDOR'S LIEN on real estate. *Id.*
3. CONTRACT MAY BE TREATED AS RESCINDED WHEN — COLLECTION OF JUDGMENT MAY BE ENJOINED WHEN. — Where a vendor of lands executed to his vendee a bond for a deed, in which he agreed to execute a deed to his vendee in sixty days from the date thereof, without any conditions, and received the vendee's note for the remainder of the purchase-money, with a power of attorney to confess judgment, and at the expiration of sixty days offered to make a deed, if the vendee would execute a mortgage to secure the unpaid note, which the vendee refused to do, and the vendor, not having complied with the conditions of his bond, afterwards obtained judgment by confession on the note in a foreign county, without notice, and the vendee not having exercised any right of ownership over the land, nor by any subsequent act committed himself to a performance on his part, it was held that the vendee had a right to treat the contract as rescinded, and to enjoin the collection of the judgment. The vendee had a right to insist upon the contract as it was made; and the offer to make a deed imposing conditions would be the same as if no offer of a deed had ever been made. *Cooper v. Tyler*, 442.
4. TAXES ON LANDS MUTUALLY EXCHANGED BY WARRANTY DEEDS, which the parties to such deeds agree shall be set off against each other, are a part of the consideration; and in an action against the vendor by one deriving title by warranty deed from the vendee to recover money paid by the plaintiff to remove the encumbrance so assumed by the vendee, parol evidence of the agreement concerning the taxes is admissible. And if, in such case, it be considered that the warranty of the vendor was broken, still the vendee could agree upon the damages, and, upon their payment, the breach would be satisfied. *Robinius v. Lister*, 674.

See ATTORNEY AND CLIENT, 10; SPECIFIC PERFORMANCE.

VENUE.

See CORPORATIONS, 32-34.

VOLUNTARY CONVEYANCES.

See FRAUDULENT CONVEYANCES.

WAREHOUSEMEN.

See INTERPLEADER; RAILROADS, 7.

WATERCOURSES.

1. OHIO RIVER IS GREAT NAVIGABLE HIGHWAY BETWEEN STATES, AND PUBLIC HAVE ALL RIGHTS that by law appertain to public rivers, as against the riparian owners; but there is no "shore" in the legal sense of that term, — that is, a margin between high and low tide, — the title to which is common. The rights of the public are only upon the water; the banks belong to the riparian owner, and he owns an absolute fee down to low-water mark. *Bainbridge v. Sherlock*, 644.
2. RIGHT TO USE OHIO RIVER AS HIGHWAY FOR PASSAGE IS DISTINCT FROM RIGHT TO LAND for the purpose of receiving and discharging freight and passengers. The former is secured to the public; the latter must be exercised with reference to the rights of the riparian owner. *Id.*

3. **RIGHT TO LAND UPON BANKS OF OHIO RIVER.** — Right of navigator to land along the banks of such streams as the Ohio River is confined to such points as have been set apart for or used as public landings, except in case of some peril or emergency of navigation, or in cases of danger or necessity, when a landing may be made upon the bank at any place without the consent of the riparian owner. *Id.*
4. **RIGHT TO BUILD AND MAINTAIN WHARF OUT TO POINT IN STREAM** where it is practicably navigable, or even beyond that point, provided it does not obstruct navigation, is a well-established incident to riparian ownership. *Id.*
5. **WHARF-BOAT OF RIPARIAN OWNER MOORED TO HIS BANK IS ENTITLED TO SAME IMMUNITIES** from trespass or obstruction by vessels navigating the river as the land itself. *Id.*
6. **RIGHT TO USE REASONABLE WATER SPACE IN FRONT OF WHARF FOR PURPOSE** of mooring vessels landing thereat is an incident to its ownership. This space, when not actually occupied by boats, may be freely traversed by the public engaged in navigating the stream, but it cannot be used as against the wharf proprietor, and without his consent, as mooring-ground for vessels. *Id.*
7. **NAVIGATOR WHO LAWFULLY LANDS AT REGULAR WHARF IS NOT JUSTIFIED BY ANY PUBLIC RIGHT** in the river or stream in so mooring his boat that its side and stern will be carried against or lie along the wharf of an adjoining wharf-owner. *Id.*

See JURISDICTION; PRESCRIPTION; RIPARIAN RIGHTS.

WILLS.

1. **FOREIGN WILL — ADMISSIBILITY OF IN EVIDENCE.** — A will made and probated in a foreign state according to the laws thereof, and duly certified in the mode required by the Illinois statute, is admissible in evidence in the latter state, though proved by but one subscribing witness. *Gardner v. Lakes*, 487.
2. **ADVANCEMENT. — IN ACTION BY CERTAIN HEIRS** of a deceased testator against others, claiming that lands conveyed to the latter were intended as an advancement, an instruction that "the purchase of land, and the payment therefor by the father, and the causing the deed to be made to a child, in the absence of all proof of intention, raises a presumption that it was intended as an advancement," is correct. *Woolery v. Woolery*, 629.
3. **ADVANCEMENT.** — Whether property given to a child by a parent shall be regarded as an advancement is purely a question of the parent's intention; but in the absence of any proof of the intention, the fact that the father voluntarily conveys real estate, or causes it to be conveyed, or transfers personalty to a child, is *prima facie* evidence of an advancement, and not a gift. *Id.*
4. **ADVANCEMENT — PAROL EVIDENCE TO DISPROVE DECLARATION.** — Where a parent, before his death, transfers or conveys property to some of his children, parol evidence is admissible to show that it was not intended as an advancement, but as a gift; and the declarations of the parent, shortly before as well as subsequent to the transfer, are admissible for that purpose. *Id.*
5. **PECUNIARY LEGACY GIVEN TO EXECUTOR IS GENERAL LEGACY, AND SUBJECT TO ABATEMENT** with other general legacies upon a deficiency of

assets, although it is expressed to be "in addition to the usual commissions at law, and as a full compensation for any extra trouble he may have in executing my will." *Clayton v. Allen*, 393.

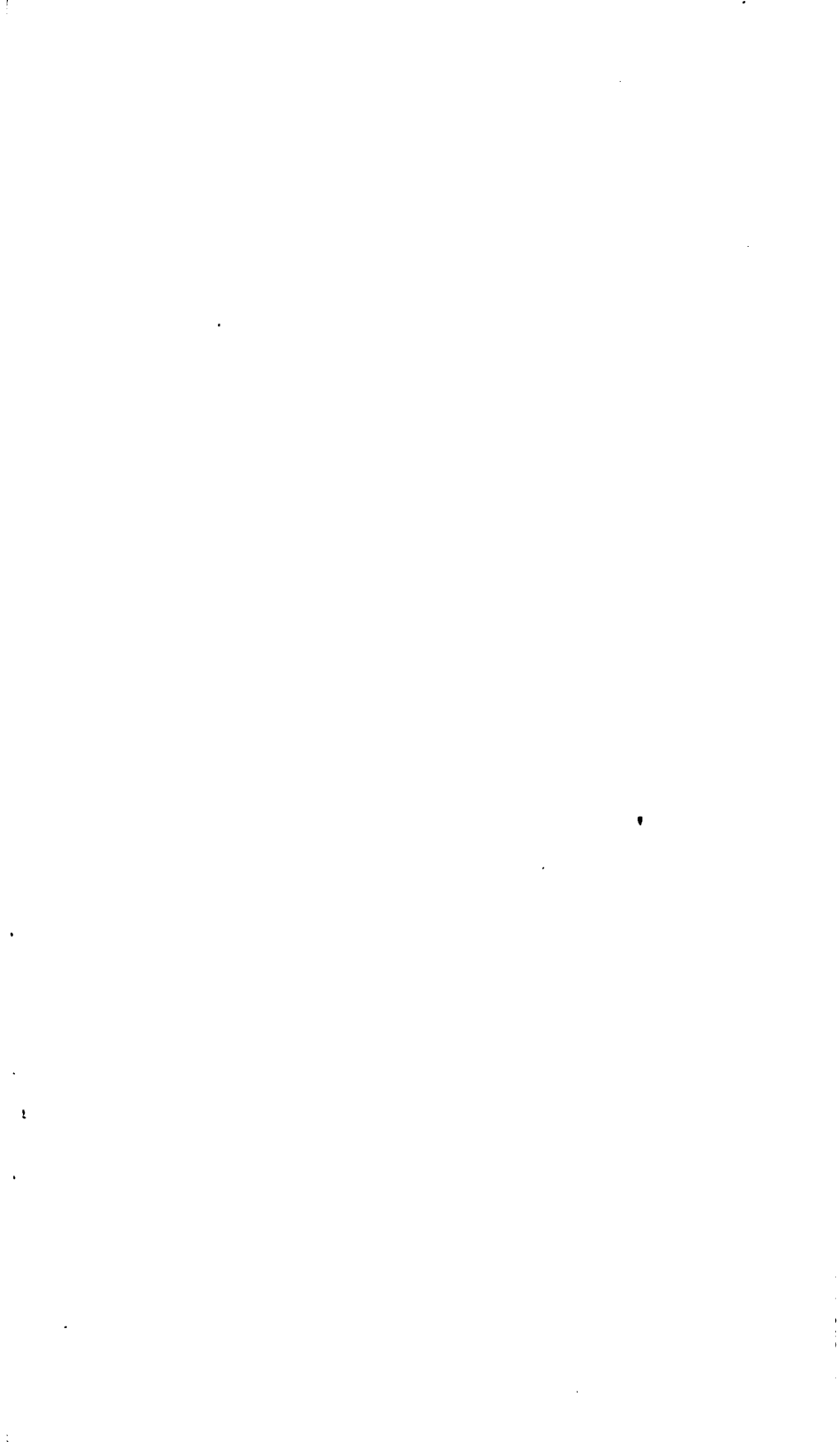
6. WORD "LEGACY" IN SUBSEQUENT ITEM OF WILL COVERS ALL OF SEVERAL REQUESTS IN FORMER ITEM, where a testator in a single item gives his wife a sum of money, various articles of personal property, and a life estate in certain realty, with the privilege of taking a sum of money in lieu of the life estate, and in a subsequent item declares that the "legacy" given to his wife was in lieu of dower. *Id.*
7. GENERAL LEGACY GIVEN TO WIFE IN LIEU OF DOWER DOES NOT ABATE upon a deficiency of assets. The wife is a purchaser in such a case. *Id.*
8. LEGACY MAY BE ADEEMED OR DESTROYED, IN GEORGIA, BY DELIVERY OVER OF PROPERTY TO LEGATEE by the testator during his lifetime, and if so, it does not pass under the will, and cannot be abated upon a deficiency of assets. *Id.*
9. ADEEMPTION OR DESTRUCTION OF LEGACY BY DELIVERY OVER OF PROPERTY TO LEGATEE by the testator during his lifetime is a question of fact to be decided by the jury under the evidence. *Id.*
10. DELIVERY OVER OF PROPERTY TO LEGATEE BY TESTATOR DURING HIS LIFETIME, IN ORDER TO AMOUNT TO ADEEMPTION or destruction of the legacy, must be of such a character as to show that it was with the intent of the testator to then part irrevocably with his dominion and ownership of the property. *Id.*

WITNESSES.

1. IMPEACHED WITNESS CANNOT BE SUPPORTED BY PROOF OF STATEMENTS made by him before the trial, which correspond with his testimony. *State v. Vincent*, 753.
2. WHERE WITNESS IS CHARGED WITH DESIGN TO MISREPRESENT, on account of his changed relation to the parties or the cause, evidence of like statements made by him before such change of relation may be admitted; so if the attempt is to show that his testimony is a recent fabrication, or when long silence concerning an injury is construed against the injured party, it is proper to show that the witness made similar statements soon after the transaction in question. *Id.*
3. IT IS COMPETENT FOR WITNESS WHO OBTAINS HIS KNOWLEDGE OF ONE'S HANDWRITING by having seen him write to say whether another paper, or another word, or name, was in the same handwriting; and the fact that such witness had seen the party write but once does not go to the competency or admissibility of his evidence, but only to the weight which should be given to it by the jury. *Cross v. People*, 474.
4. WITNESS IS NOT BOUND TO GIVE TESTIMONY which may tend to show himself guilty of crime, nor to disclose a single link in the chain of evidence which would convict him. *Ford v. State*, 658.
5. WITNESS FOR DEFENSE, IN PROSECUTION FOR BASTARDY, CANNOT BE COMPELLED TO TESTIFY whether he has ever had sexual intercourse with the prosecutrix, if he objects that the answer might tend to criminate him; nor can he be compelled to answer other questions tending to show that his claim of privilege was not well founded. *Id.*
6. WHERE WITNESS HAS REFUSED TO ANSWER QUESTION UPON GROUND that his answer would tend to criminate himself, defendant may show, by other and independent evidence, that his answer would not or could not have that effect; and the witness will then be compelled to testify. *Id.*









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